REPORTS OF CASES

DECIDED BETWEEN

JUNE 9, 1962 and MARCH 1, 1963

IN THE

Supreme Court of Nebraska

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For the benefit of the State of Nebraska

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TABLE OF CASES REPORTED

Airport Authority; Sky Harbor Air Service v. 243
Anderson Equipment Co.; Hermansen v. 325
Anderson, In re Estate of, 398
Anderson v. Lamme 398
Anson v. Grace 258
Appeal of Francis R. Orshek Co., In re, 668
Application of Black Hills Stage Lines, Inc., In re, 425
Application of City of Lincoln, In re, 837
Application of Hagen Truck Lines, Inc., In re, 646
Application of Midwest Mail Service, Inc., In re, 809
Arla Cattle Co. v. Knight 360
Ash; Light v. 44, 627

Bankers Dispatch Corp.; Midwest Mail Service, Inc. v. 809
Beck, State ex rel., v. Frontier Airlines, Inc. 172
Bellevue Bridge Commission; Cochran v. 761
Berg; Midwest Laundry Equipment Corp. v. 747
Black Hills State Lines, Inc., In re Application of, 425
Black Hills Stage Lines, Inc. v. Greyhound Corp. 425
Boehner; State ex rel. Brogan v. 689
Brogan, State ex rel., v. Boehner 689
Brown; State v. 387, 393
Brownville Grain Co.; Holland v. 742
Bucholz v. City of Omaha 862
Burton; State v. 457

Caldwell v. Wells 288
Card v. Card 124
Cascio; Huetter v. 771
Cather & Sons Constr., Inc.; Karpisek v. 234
Chipman v. Chipman 584
City of Grand Island, State ex rel., v. Tillman 23
City of Kimball; Snowardt v. 294
City of Lincoln, In re Application of, 837
City of Lincoln; Johnson v. 837
City of Lincoln; Reller v. 638
City of Lincoln; Shamberg v. 146
City of Omaha; Bucholz v. 862
Claussen; Katt v. 603
Cochran v. Bellevue Bridge Commission 761
Coker v. Coker 218

Commonwealth Co.; Hansen v. 70
Cook v. Ketchmark 222
Coryell, In re Estate of, 603
County of Nemaha; Gorgen v. 588
County of Seward; Fougeron v. 753
County of Seward; Skalak v. 659
Crawford; Herndon v. 618
Crowley; State v. 291
Cullinane v. Milder Oil Co. 162

Dawson County Feed Products, State ex rel., v. Omaha P. P. Dist. 350
Dillon; State v. 560
Dorshorst, In re Estate of, 886
Dorshorst v. Dorshorst 886
Dudden Implement, Inc.; Sheridan v. 578

Easter; State v. 412
Elander v. Kellogg Grain Co. 782
Estate of Anderson, In re, 398
Estate of Coryell, In re, 603
Estate of Dorshorst, In re, 886
Estate of Lewin, In re, 596
Estate of Ost, In re, 591
Estate of Polly, In re, 222
Erickson; Nordahl v. 204
Erving v. State 90
Everett v. Hening 573

Fairley v. Kemper 565
Farmers Mutual Ins. Co.; Grantham v. 790
Farnam, Village of; Jones v. 704
Farrar; Willan v. 826
Fougeron v. County of Seward 753
Francis R. Orshek Co., In re Appeal of, 668
Francis R. Orshek Co. v. State 668
Fromkin; State v. 849
Frontier Airlines, Inc.; State ex rel. Beck v. 172

Gentry v. State 515
Goff; State v. 217, 548
Gorgen v. County of Nemaha 588
Grace; Anson v. 258
Grand Island, City of, State ex rel., v. Tillman 23
Grantham v. Farmers Mutual Ins. Co. 790
Gretna, Village of; McCubbin v. 139
Greyhound Corp.; Black Hills Stage Lines, Inc. v. 425
Gross v. Johnson 273

Haarberg v. Schneider 334
Hagen Truck Lines, Inc., In re Application of, ... 646
Hagen Truck Lines, Inc. v. Ross 646
Hans, In re, ... 612
Hans; State ex rel. Weiner v. 612
Hansen v. Commonwealth Co. 70
Harding v. Harding 371
Hening; Everett v. 573
Henry; State v. 432
Hermansen v. Anderson Equipment Co. 325
Herndon v. Crawford 618
Hibdon; Schwartz v. 129, 397
Hiner v. Nelson 725
Holland v. Brownville Grain Co. 742
Hopwood v. Voss 304
Howard v. State 90
Hoye; State v. 409
Huetter v. Cascio 771

In re Estate of Anderson 398
In re Estate of Coryell 603
In re Estate of Dorshorst 886
In re Estate of Lewin 596
In re Estate of Ost 591
In re Estate of Polly 222
In re Hans 612
In re Appeal of Francis R. Orshek Co. 668
In re Application of Black Hills Stage Lines, Inc. 425
In re Application of City of Lincoln 837
In re Application of Hagen Truck Lines, Inc. 646
In re Application of Midwest Mail Service, Inc. 809

Johnson; Gross v. 273
Johnson; State v. 432
Johnson v. City of Lincoln 837
Johnson; Zager v. 106
Jones & Sons, Inc. v. Nelson 655
Jones v. Village of Farnam 704
Journal-Star Printing Co.; Seymour v. 150

Karpisek v. Cather & Sons Constr., Inc. 234
Kasparek v. May 732
Katt v. Claussen 603
Kellogg Grain Co.; Elander v. 782
Kemper; Fairley v. 565
Kent; State v. 115
Ketchmark; Cook v. 222

Kimball, City of; Snowardt v. 294
Knight; Arla Cattle Co. v. 360
Knuth v. Singer 182
Krimlofski v. Matters 774

Lamme; Anderson v. 398
Leu v. Swenson 591
Levering; State v. 387
Lewin, In re Estate of, 596
Lewin v. Lewin 596
Light v. Ash 44, 627
Lincoln, City of, In re Application of, 837
Lincoln, City of; Johnson v. 837
Lincoln, City of; Reller v. 638
Lincoln, City of; Shamberg v. 146
Lincoln Eng. Constr. Co.; O. K. Door Co., Inc. v. 682
Lindelow v. Peter Kiewit Sons', Inc. 1
Losieau; State v. 320

Mahloch; State v. 190
Main v. Sorgenfrei 523
Marion; State v. 698
Matters; Krimlofski v. 774
May; Kasparek v. 732
May; State v. 717
McCubbin v. Village of Gretna 139
Meyer, State ex rel., v. Sorrell 340
Midwest Laundry Equipment Corp. v. Berg 747
Midwest Mail Service, Inc., In re Application of, 809
Midwest Mail Service, Inc. v. Bankers Dispatch Corp. 809
Milder Oil Co.; Cullinane v. 162
Morning View Cemetery Assn.; Root v. 438, 805
Morrow; Spath v. 38

Nelson; Hiner v. 725
Nelson; R. B. Jones & Sons, Inc. v. 655
Nemaha, County of; Gorgen v. 588
Nile Valley Fed. Sav. & Loan Assn. v. Schank 35
Nordahl v. Erickson 204
Norwood; State v. 255

O. K. Door Co., Inc. v. Lincoln Eng. Constr. Co. 682
Olson v. Union Fire Ins. Co. 375
Omaha, City of; Bucholz v. 862
Omaha P. P. Dist.; State ex rel. Dawson County Feed Products v. 350
Omey v. Stauffer 247
O'Neill v. State 540

Orshek Co., In re Appeal of,---- 668
Orshek Co. v. State---- 668
Ost, In re Estate of,---- 591

Pep Sinton, Inc. v. Thomas---- 508
Peter Kiewit Sons', Inc.; Lindelow v.---- 1
Petsch; Rogers v.---- 313
Polly, In re Estate of,---- 222

Ransdell v. Sixth Street Food Store---- 875
R. B. Jones & Sons, Inc. v. Nelson---- 655
Reller v. City of Lincoln---- 638
Roach v. Roach---- 266
Rogers v. Petsch---- 313
Root v. Morning View Cemetery Assn.---- 438, 805
Ross; Hagen Truck Lines, Inc. v.---- 646
Ross v. Ross---- 795

Schank; Nile Valley Fed. Sav. & Loan Assn. v.---- 35
Schneider; Haarberg v.---- 334
Schwartz v. Hibdon---- 129, 397
Seward, County of; Fougeron v.---- 753
Seward, County of; Skalak v.---- 659
Seymour v. Journal-Star Printing Co.---- 150
Shamberg v. City of Lincoln---- 146
Sheridan v. Dudden Implement, Inc.---- 578
Singer; Knuth v.---- 182
Singles v. Union P. R.R. Co.---- 816
Sinton, Pep, Inc. v. Thomas---- 508
Sixth Street Food Store; Ransdell v.---- 875
Skalak v. County of Seward---- 659
Sky Harbor Air Service v. Airport Authority---- 243
Smith; State v.---- 86
Snowardt v. City of Kimball---- 294
Sorgenfrei; Main v.---- 523
Sorrell; State ex rel. Meyer v.---- 340
Spath v. Morrow---- 38
State ex rel. Beck v. Frontier Airlines, Inc.---- 172
State ex rel. Brogan v. Boehner---- 689
State ex rel. City of Grand Island v. Tillman---- 23
State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. 350
State ex rel. Meyer v. Sorrell---- 340
State ex rel. Weiner v. Hans---- 612
State; Erving v.---- 90
State; Francis R. Orshek Co. v.---- 668
State; Gentry v.---- 515
State; Howard v.---- 90

State; O'Neill v. 540
State v. Brown 387, 393
State v. Burton 457
State v. Crowley 291
State v. Dillon 560
State v. Easter 412
State v. Fromkin 849
State v. Goff 217, 548
State v. Henry 432
State v. Hoye 409
State v. Johnson 432
State v. Kent 115
State v. Levering 387
State v. Losieau 320
State v. Mahloch 190
State v. Marion 698
State v. May 717
State v. Norwood 255
State v. Smith 86
State v. Wiemers 409
State v. Wilson 86
State v. Witmer 449
Stauffer; Omey v. 247
Swenson; Leu v. 591

Thomas; Pep Sinton, Inc. v. 508
Tillman; State ex rel. City of Grand Island v. 23

Union Fire Ins. Co.; Olson v. 375
Union P. R.R. Co.; Singles v. 816

Village of Farnam; Jones v. 704
Village of Gretna; McCubbin v. 139
Voss; Hopwood v. 304

Weiner, State ex rel., v. Hans 612
Wells; Caldwell v. 288
Wenzel v. Wenzel 61
Wiemers; State v. 409
Willan v. Farrar 826
Wilson; State v. 86
Witmer; State v. 449
Workman v. Workman 471

Zager v. Johnson 106

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1962

BJORN LINDELOW, APPELLEE, V. PETER KIEWIT SONS', INC., A CORPORATION, APPELLANT.
115 N. W. 2d 776

Filed June 15, 1962. No. 35157.

1. **Negligence.** An "invitee" is defined as a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage.
2. ———. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition, but licensees take the premises as they find them, the only duty of the occupier being to give notice of traps or concealed dangers.
3. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
4. ———. In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
5. ———. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.

6. ———. A mere scintilla of evidence is not enough to require the submission of an issue to the jury.
7. ———. If, from undisputed evidence, different minds may not reasonably reach different conclusions or draw different inferences, the trial court should render judgment consistent with the facts.
8. Witnesses. As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion.

Appeal from the district court for Douglas County: JOHN A. BURKE, Judge. Reversed and remanded with directions.

Stoehr, Rickerson, Sodoro & Caporale, for appellant.

Seymour L. Smith and W. L. (Jim) Weber, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This is an action for damages for personal injuries brought by Bjorn Lindelow, plaintiff and appellee, against Peter Kiewit Sons', Inc., a corporation, defendant and appellant, in the district court for Douglas County, Nebraska. A trial was had before a jury. At the close of the plaintiff's case the defendant moved for a directed verdict. The court overruled the motion and the defendant rested without introducing any testimony. Thereupon, the case was submitted to the jury which returned a verdict for the plaintiff in the sum of $379,500, and judgment was rendered against the defendant in that amount.

The defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial and upon the overruling thereof has brought the case to this court on appeal.

The injuries which the plaintiff sustained were in-

curred when he dove from a dock on the premises maintained by the defendant. The dock was on a lake known as Kiewit Lake. It is located on an area in Cass County which is east of highway No. 75, three-quarters of a mile south of the Platte River and 3 miles west of the Missouri River. The lake itself was created about the year 1934 by dredging and the hole incident thereto filling with water from underground, and from rain, snow, and runoff. About 12 or 18 months after the area was dredged the banks were at least in part sloped and sand was added for bathing. The original work was done by Peter Kiewit Sons' Company, a separate corporation, which still has title to the land itself. Commencing in the year 1941, it was first maintained by Peter Kiewit Sons' Company but during the times mentioned herein by defendant for picnicking, boating, swimming, fishing, ice skating, softball, and horseshoes. Its use was restricted to the employees of both Peter Kiewit Sons' Company and the defendant Peter Kiewit Sons', Inc. It was maintained to facilitate better employee morale. No charges were made to the employees though on occasion charcoal was sold to them for fuel in preparing food. On the northerly side of this lake was a floating dock. It was a platform 8 by 12 feet in dimensions in the nature of a raft, covered with burlap or sacking and supported on the surface of the water by a bevy of 10 55-gallon common oil barrels. On the side of the raft towards the lake was a diving board which on comparison with the raft from photographs in evidence seems to extend half its length or 6 feet farther out toward the center of the lake. On the side towards the shore was a plank which served as an approach to the float and also tended to keep the raft in position. It was fastened to the raft and in turn to a wooden timber on the shore. Ropes ran from the two corners of the raft nearest the shore to a post and a tree, respectively, to keep it from moving to the right or left, though it could move somewhat either way as the

lake rose or fell or, to some extent, from the wind. If the lake rose the ropes were shortened and if it fell they were lengthened.

There was a caretaker and watchman employed by the defendant on the grounds whose name was John Thomas, who will hereafter be referred to as Thomas. He resided the year-round in a cottage near the lake. This caretaker was 72 years of age. He had served continuously as watchman and caretaker since 1939. His duties were to see that outsiders didn't get in and those entitled to enter could do so, to keep the grass and weeds cut and raked, and to destroy the leaves according to instructions given him originally by defendant's vice president. Thomas and the plaintiff, his wife, and child had known each other for several years.

On the Sunday morning of March 10, 1957, the plaintiff, then about 34 years of age and employed by the defendant as an estimator, with his wife and 10-year-old daughter, went to this area, taking their lunch. They arrived there shortly before noon. Thomas was then at church. There were two gates to the grounds, both of which were locked. They stopped at both gates and honked at the gate close to the caretaker's cabin. Getting no response, they climbed over and crawled under the gate. They had previously entered in this manner when the gate was locked. They went to a cabin which had an open fireplace where food could be cooked. It had a screened porch facing the lake. Thomas returned from church about 12:30 p.m. Noticing their car at the gate, he went to the cabin where they were eating and visited with them. Plaintiff said to Thomas he was sorry they drove all the way down and he wasn't there, and in his absence they decided to climb over the gate. Thomas answered that he was sorry he wasn't there because it was his job. Plaintiff then stated that if Thomas went to church it didn't matter, they got in anyway.

Plaintiff's wife asked the caretaker, "Do you think we are crazy to go swimming this early in the year?"

Thomas replied, "No, I don't. The premises are open here. The lake is here, you can go swimming any time you want to." Plaintiff told his wife that she had cheated him by having her bathing suit under her slacks while he had not brought his own. Thomas then informed the plaintiff that his swimming suit was in the change house; that plaintiff had forgotten it last fall; and that he knew it was the plaintiff's because he was the last to swim there. After this conversation Thomas left to prepare his lunch.

It was a warm day for March with the temperature about 70° at the time of the accident. The report of the United States Weather Bureau at Omaha that day showed a high of 71° and a low of 38°. When they finished their lunch the plaintiff and his wife changed into bathing suits. After sunning themselves on the beach for about an hour the wife stood up and hurried out to the lake and waded out until the water came to her waist and then swam in a semi-circle back approximately to the same point. While she was doing this the plaintiff, in what he says was a half run, went to the dock and, after watching his wife a short time, dove in at a point shown on a photograph taken of the dock about 3 feet from the southeasterly corner of the dock, which corner is toward the lake.

On being helped from the water after this one dive it was found that plaintiff was injured. An ambulance was called and he was taken to the hospital. It was there found that his injuries were very severe. Though they are not necessary to this opinion, it can be said that he suffered a comminuted fracture of the sixth cervical vertebra resulting in paralysis of the lower limbs and of any functions where the nerve roots leave the spinal cord below the sixth cervical vertebra. Plaintiff's condition is diagnosed as that of a quadriplegic, which is paralysis involving the four extremities, and in plaintiff's case included the loss of the normal control of his kidneys and bowel. The condition appears perma-

nent and he will always be confined to a life in a wheelchair and a specially-made bed, with a device for lifting him from one to the other. He has had operations and extensive treatment of an expensive nature in the past which have necessitated great care, and he will require both treatment and care in the future.

The facts as set out above are of course ascertained from the evidence introduced by the plaintiff's own witnesses and are not in dispute. The rest of the evidence will be discussed as it appears pertinent to our decision. In those particulars where we find a variance we will note it as the plaintiff is entitled to receive every reasonable inference in view of the verdict of the jury.

The defendant makes 16 assignments of error, but in view of our ruling it will be necessary to discuss only the following: The trial court erred in holding that the evidence was sufficient to sustain the verdict; in not holding as a matter of law that the plaintiff was a licensee; in ruling that there was sufficient evidence of defendant's negligence for the jury to consider; in not ruling that the plaintiff was guilty of contributory negligence as a matter of law sufficient to bar recovery; in not holding that the plaintiff was guilty of assuming the risk as a matter of law sufficient to bar recovery; and in overruling defendant's motion for judgment notwithstanding the verdict.

In consideration of the case before us the first question to be deduced is the status of the plaintiff with respect to his presence on the premises where he was injured. That involves the question of whether the plaintiff was an invitee or a licensee thereon. The trial court evidently considered that under the evidence this was a question of fact to be determined by the jurors and submitted it to them for their decision. On this issue, as in all such questions, the rule is that before the evidence is submitted to the jury, there is a preliminary question for the judge, not whether there is literally no evidence but whether there is any evidence upon

which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238.

The law with respect to invitees and licensees was discussed by this court in Malolepszy v. Central Market, 143 Neb. 356, 9 N. W. 2d 474, where this court stated: "This court has clearly defined the three terms as follows: 'The law places those who come upon the premises of another in three classes: Invitees are those who are expressly or impliedly invited, as a customer to a store; licensees are persons whose presence is not invited, but tolerated; trespassers are persons who are neither suffered nor invited to enter.'"

The case of Malolepszy v. Central Market, *supra,* cites certain portions of Restatement of the Law, on the question of licensees as distinguished from business invitees which, though applicable, are not deemed to exactly express the rules affecting the case before us as well as these from which we will now quote from the same work.

In Restatement, Torts, § 330, p. 893, the general rule defining a licensee is given as follows: "A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by invitation or permission. * * *

"An invitation differs from a permission only in this: an invitation is conduct which justifies others in believing that the possessor desires them to enter; a permission is conduct justifying others in believing that the possessor is willing that they shall enter if they desire to do so. It is immaterial whether the consent which creates the license is an invitation originating with the possessor of the land or by a permission given upon request made by the licensee. The important fact is that the entry is by the consent of the possessor and it is immaterial that the suggestion of the visit originates with him or with his licensee." On page 894 of the

same section of that work it states: "A license may be given by any words, either written or spoken, which manifest consent."

"An 'invitee' is defined as a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage." 65 C. J. S., Negligence, § 43(1), p. 508. The same rule appears to be recognized in Restatement, Torts, § 332, p. 897.

The case of Kruntorad v. Chicago, R. I. & P. Ry. Co., 111 Neb. 753, 197 N. W. 611, is cited by the plaintiff herein and the language of the court is quoted wherein it said: "There is much confusion from the failure of courts to distinguish between a license and an invitation, and particularly between an implied license and an implied invitation. An invitation is inferred where there is a common interest or mutual advantage, or where an owner or occupant of premises, by acts or conduct, leads another to believe the premises, or something thereon, were intended to be used by such other person; that such use is not only acquiesced in by the owner or occupant, but is in accordance with the intention or design for which the way, place or thing was adapted or prepared or allowed to be used; while a license is implied where the object is the mere pleasure, convenience or benefit of the person enjoying the privilege."

Plaintiff argues that the wording of the quoted portion of the decision is applicable to the case before us and that the premises here involved were intended and designed for use as a recreation ground for plaintiff, including swimming, and it follows that the plaintiff was an invitee within the words quoted in that case. In the cited case the stairs in question were not constructed by the defendant railroad. They had no connection with its business but were adapted, prepared, and allowed to be used for the "mere pleasure, convenience, or benefit of the person enjoying the privilege." The holding in

the cited case we believe was clearly based on the fact that the injured plaintiff was using the stairway for his own affairs not connected with the defendant's business and not built by it or maintained with respect to its business.

In cases attempting to distinguish between licensees and invitees where there is an express invitation there is also confusion over the term invitation. In many instances where the court finds there was a license only it continues by further stating there was no invitation under circumstances that might lead one to suppose that wherever there is an invitation as a layman uses it in ordinary social affairs of life, the one receiving it becomes an invitee as the term is used in law.

The authorities cited and the cases clearly hold however that a license may result from an invitation making one a licensee or, on the other hand, may be such as to make one an invitee. The real difference is the purpose of the invitation. If the invitation relates to the business of the one who gives it or for the mutual advantage of both parties of a business nature, the party receiving it is an invitee. If it is an invitation for the convenience, pleasure, or benefit of the person enjoying the privilege it is only a license and the person receiving it is a licensee.

Many courts speak of those who receive invitations for matters not connected with business as social guests. They are however but licensees. The matter is discussed in 38 Am. Jur., Negligence, § 117, p. 778. It there states: "Although there is not a great deal of authority upon the point, the rule appears to be that the relation between host and guest is not that of invitor and invitee, but that of licensor and licensee, and that, in accord with the general principle which determines liability of an owner or occupant of premises to one who comes thereon as a mere licensee, the host is not liable for an injury sustained by the guest from some defect in the condition of the premises, except as the licensee is

needlessly exposed to peril through the failure of the owner or occupant to warn him of danger, or by the active negligence of the owner or occupant. There is no duty on the part of the host to reconstruct or improve the premises for the purpose of making his house more convenient or more safe for those accepting his hospitality, gratuitously extended. The guest assumes the ordinary risks which attach to the premises. No exception is made to the rule because of the fact that the guest enters on the host's express invitation to enjoy his hospitality. * * * However, the rule is that a host who knows of a concealed danger upon the premises is guilty of negligence if he permits the guest, unwarned of the peril, to come in contact therewith, and he may be held liable to the guest for an injury thus sustained."

Other courts speak of persons receiving invitations not connected with business as gratuitous licensees and the rule is the same as given in regard to social guests. Cases to this effect are cited in a note in 25 A. L. R. 2d 598; and in that annotation, § 4, p. 605, a general rule is stated in cases where invitation of a social guest did have incidental motives other than purely social as follows: "In most of the cases here considered the status of the plaintiff as a social guest has been conceded or assumed in the light of the uncontested facts. However, it is sometimes necessary to decide the preliminary issue of the plaintiff's status at the time of injury. It is clear that the fact that the visit during which the plaintiff was injured may have incidental motives other than purely social ones will not be sufficient to characterize the visitor as an 'invitee.' "

In Spence v. Polenski Bros., Schellak & Co., 110 Neb. 56, 193 N. W. 101, the court held: "Where a pond is formed on the premises of an owner as the natural consequence of removing clay for the manufacture of brick, and where an employee of the owner, a boy 16 years of age, during the noon hour, without the direction of the master, either express or implied, but with his knowl-

edge and consent, voluntarily goes swimming in the pond for his own pleasure, and not in furtherance of the master's business, and is drowned, such employee is a licensee, and the master owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the master or his servants." In the cited case the court further stated: "It is a well-settled doctrine that, before the master can be held liable for an injury to his servant growing out of such relationship, it must appear that the servant was injured through the negligence of the master, and that at the time of the injury the servant was engaged in carrying out some part of the master's business, or going to or from the master's service along avenues provided by the master. The rule, however, does not extend to a situation where the servant at the time of the injury was acting outside of the scope of his employment, for his own purpose, without the direction of the master, either express or implied." It is true that there is general language in the cited case in which the court says that a knowledge or acquiescence on the owner's part does not amount to an invitation so as to impose upon the owner the obligation which he owes to an invited guest. The decision however was based upon the premise that the employee was at the time pursuing his own pleasure and that his presence on the premises had no connection with the employer's business.

It appears from an examination of the authorities that in order to be an invitee on the premises of another the invitation of the owner or occupant must be related with the business of the owner or occupant or to their mutual advantage.

In the case before us the defendant had sent letters to its employees, including the plaintiff, with respect to the use of the recreation grounds. Four of these are contained in the evidence. The first is dated July 31, 1953, and is directed "To All Home Office Employees." The letter explains it is for the benefit of new employees:

and states the wish to outline the policies and rules of the company. Thereafter, it gives directions to enable them to reach the lake. It says further that it will be open for all employees on Saturdays and Sundays; that on those days because of the large number using the lake its use must be limited to married employees, husband, wife, and children, and single employees with one or two friends or relatives; and that the use of the grounds, Monday through Friday, must be reserved and tells who must be contacted to make the reservation so that the ones reserving it might invite friends. It then states that there were no arrangements for disposal of tin cans or bottles and that such items must be taken home and not thrown in the fireplace. All garbage, paper plates, napkins, cartons, and papers must be burned or carried off the premises. Lastly, if the cabin were used it must be swept and left orderly.

On May 7, 1954, another letter was sent which mentions the premises and the lake which is described as suitable for swimming, with sand beach, picnic tables, and outside fireplace. It gives the same instructions concerning those entitled to its use on days of the week, except it states that only three reservations may be made by one employee on Monday through Friday because of the great demand during the past years. The rules with respect to garbage and other refuse were repeated and the requirements somewhat enlarged upon, including a statement that the gate must be closed at all times and locked on leaving. The letter contains the following statement: "*If we are to continue to* provide these facilities for your enjoyment, we must ask your wholehearted cooperation in observing the above. You are all welcome to use the lake and it is our hope that by limiting the reservations to three per employee, more of you will be able to enjoy its facilities *this season.*" (Emphasis supplied.) On May 9, 1955, another letter was sent in which it states: "Because of the great demand for Kiewit Lake and the limited number of days

during *the summer* that it is available, it has been necessary to revise our policy in regard to reservations." (Emphasis supplied.)

The reservation privilege was further restricted to two reservations a year and it provided that during that year only one reservation could be made at a time and that it had to be used before another was made. The use on Saturdays and Sundays was continued as restricted to the employees and their immediate families. The explanation of requirements for disposal of garbage and trash by the employees was repeated.

On July 5, 1956, another letter was sent in which it was said that as a result of heavy demands, it was more important than ever that all observe the rules governing the use of the lake, which rules were set out in detail.

The letters, which plaintiff's counsel treats as invitations making the plaintiff an invitee, appear to welcome the employees to make use of the premises but in none of them is any suggestion that they are urged to use them or that the use of the facilities is particularly sought or desired by the defendant. The employees' attendance at the area had nothing to do with their work. Certainly no immediate business benefit accrued to the defendant. The defendant maintained no control over those using the area except it sought to require them to take care of their own trash and garbage, and to close and lock the gates. The employees were warned that if the use of the area were to continue they must obey these requirements. The restrictions as to use were narrowed each year because of increased patronage. As we view the letters, coupled with all the evidence in the case, the plaintiff was granted the privilege to make use of the premises as a licensee and not as an invitee.

Neither is our opinion altered by the claims of the plaintiff that the consent to go upon the premises was of business value to the defendant. This is apparently the theory which the trial court considered raised a question of fact for the jury. Plaintiff's contention rests

largely on the testimony of Dr. William H. Thompson, a psychologist and professor at the University of Omaha, who had made a study of industrial psychology. He testified as an expert witness that the defendant's facility had some business value to the defendant because it built up the morale of the employees, discouraged dissatisfaction, and encouraged continuity of employment. We think if such value existed, which might well be, it was remote and intangible in nature and not one directly connected with a business purpose. Neither does the testimony that on occasion the caretaker sold charcoal to the employees to facilitate cooking lunch make the plaintiff an invitee. These sales were trifling and appear wholly as a convenience to the employees and certainly were not for commercial profit. They were not connected with swimming or diving and were not availed of by the plaintiff on this occasion, nor does the evidence show he ever bought any.

The contention of the plaintiff that the conversation between himself, his wife, and the caretaker Thomas made the plaintiff an invitee is not convincing. The letters from defendant all told the employees whom they might contact for further information concerning the use of the lake, and he was not the caretaker. The plaintiff himself testified that the caretaker's duties were understood by him to consist of caring for the trees and keeping people that did not work for the company away from the grounds; that he kept the premises in order as far as raking, cutting the grass around his home, and taking care of the house or cottage. Some of the letters from the defendant speak of the use of the premises mentioned during the "season" or "summer." Two of them were sent in July, the first reciting it was for the benefit of new employees. The other two were sent in May. Thomas, a witness for the plaintiff, testified that the swimming season for 1956 was from about May 1st to September 1st. There was no evidence to the contrary and the evidence as a whole indicates no one used

the lake for swimming in March or April, except the plaintiff on the occasion when he was injured. It seems clear that the plaintiff knew at the time of the conversation with Thomas that the lake had not been made ready for the usual swimming period. The question plaintiff's wife asked Thomas as to whether he thought they were "crazy" to go swimming at that season shows that they understood it was unusual. The reply of Thomas could only be construed as a further permission or license applicable to that time, and not as an invitation on behalf of the defendant with a business implication when it concerned only one employee. It was in furtherance only of the plaintiff's recreation, enjoyment, and pleasure.

We will now state the rules of law which we deem applicable in this case, both on the question of the status of the plaintiff as a licensee or invitee, which we have hitherto considered, and the other questions which will be discussed later.

In Edgar v. Omaha Public Power Dist., *supra,* this court stated:

" 'A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.' Crane v. Whitcomb, 160 Neb. 527, 70 N. W. 2d 496."

As stated in Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551: "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The rule is well stated in Farr Co. v. Union P. R. Co., 106 Fed. (2d) 437, as follows: 'The rule is that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether

there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.' " See, also, Armer v. Omaha & C. B. St. Ry. Co., 153 Neb. 352, 44 N. W. 2d 640.

In Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405, this court held: "Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination."

Also, in Leach v. Treber, 164 Neb. 419, 82 N. W. 2d 544, we held: "If, from undisputed evidence, different minds may not reasonably reach different conclusions or draw different inferences, the trial court should render judgment consistent with the facts. * * *

"As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion." See, also, Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

Relating these rules to the evidence before us nothing appears from which it might reasonably be inferred that the plaintiff was an invitee upon the premises. The issue with respect to whether he was an invitee or a licensee should never have been submitted to the jury and the trial court erred in not finding as a matter of law that the plaintiff at the time of his injury was a licensee thereon.

The trial court, after submitting to the jury the question of whether the plaintiff was a licensee or an invitee, submitted the question of the defendant's negligence to the jury, in case it found he was an invitee, in the following particulars:

"1. In failing to furnish a place around and out from said dock of sufficient depth and in such condition so as to permit diving with safety.

"2. In failing to mark the depth of the water at or near said dock.

"3. In failing to warn its employees and particularly the plaintiff of the insufficiency of the depth of the water around and out from said dock for diving.

"4. In failing to determine whether or not the water was of sufficient depth to permit the plaintiff to dive with safety as he had done on prior occasions."

The plaintiff contends that even if the plaintiff was a licensee it was the duty of the defendant who maintained the premises to give notice of traps or concealed dangers to the plaintiff. Such a rule is set out in Malolepszy v. Central Market, *supra,* in which this court quoted from the previous case of Haley v. Deer, 135 Neb. 459, 282 N. W. 389, saying: "The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition, but a licensee takes the premises as he finds them, for the only duty of the occupier to a licensee is to give notice of traps or concealed dangers."

The plaintiff's claim of an entrapment or concealed danger is premised on evidence that the raft or dock had been moved since October 1956, and that the water at the dock was not as deep as it was in the fall when the plaintiff had last been swimming. The defendant on the other hand contends that under the circumstances shown by the evidence, the plaintiff assumed the risk involved when he dove as a matter of law, and that he was guilty of contributory negligence more than slight as a matter of law. Inasmuch as the evidence concerning these questions is the same, we will now discuss that which has not already been referred to with respect to these conflicting claims.

In regard to changing of the location of the dock the plaintiff himself testified that it was in the same position it had been in the fall. Thomas in his testimony said he was aware of no change although it did at times change on the rise and fall of the lake or from wind

within the limits of the ropes which held it in place. On the rise and fall of the lake which on occasion varied as much as 3 feet, he shortened or lengthened the ropes and that he had not done so since the swimming season of 1956, which was prior to September 1, and a considerable time before the plaintiff used the dock in October. He estimated the lake to be of average height at the time of plaintiff's injury. Pictures of the dock about the time of the accident show these ropes and there appears to be some slackness in one of them, though it does not appear very great. The plaintiff's wife did tesitfy that the dock had moved considerably and that it appeared to her to be 2 or 3 feet closer to the shore than in previous years. She had testified in a previous deposition that its position was not changed. Her testimony might have been of some probative value considering the fact that the jury might consider the evidence in the light most favorable to the plaintiff were it not for the fact that she further stated she had been in Sweden from June 1956, through October 1956, during which time her husband used the lake. Under such circumstances it would appear that she could have no knowledge of whether its position had changed since her husband used it in 1956. Plaintiff's wife testified that when she got to the plaintiff and got her elbows under his arms the water was only about to her waist or 3 feet deep, but the evidence shows he had been struggling in the water as she had been going to him and it is not shown whether or not this was the place at which he entered the water. She previously stated in a deposition that she had waded out until the water became quite high on her.

After the accident the plaintiff's wife pointed out the place near the dock from which her husband dove. She is shown in a photograph in evidence standing upon the dock and pointing to the place where he had stood. After the plaintiff's injury the sheriff was summoned, and he and Thomas with a fishing pole made soundings

about this spot and reached out 8 or 10 feet in the direction in which he dove, and they both estimated the depth of the water at that place was 5 feet. Within 2 or 3 days thereafter a boat which was usually on the lake, but at the time of plaintiff's injury had been taken away for painting, was brought back and Thomas made soundings with a rake for obstacles within a distance of 8 or 10 feet of the dock at the point where plaintiff dove. No obstacles which he might have struck were discovered and there is no evidence whatever that there were any obstacles in the vicinity. On the 12th and 13th of March 1957, Richard Lawrence Foster, employed by the defendant, made soundings on the lake. Stakes or hubs, as they were called, were placed on the lake bank every 25 feet on either side of it, 5 feet back from the waterline. Foster, with a helper, got in the boat and they sighted from one hub to the one on the other side of the lake. They dropped a weight on a rope with a tape twined about it every 10 feet for 50 feet out from either shore. He then made profiles showing the result of the work. Exhibit 15 is the profile of the line crossing the lake and passing through about the center of the dock and through the length of the diving board. On this line he testified his sounding made 20 feet from the hub on the shore was right in front of the raft. At that point the profile exhibit 15 shows the lake about 4 feet deep. This point however, from an examination of the photographs in evidence, must be 5 or 6 feet across the end and corner of the dock from the place where the plaintiff dove from the side of the raft. Going out from the front of the raft toward the end of the diving board the lake bottom drops rapidly and under the end of the diving board it is 7½ to 8 feet deep. Foster testified also from exhibit 5, a photograph of the dock, diving board, and the lake shore to the southwest thereof, taken by the sheriff on March 10, 1957, the day of the injury, that the weeds and vegetation came right down to the water's edge. An examina-

tion of this exhibit 5 clearly shows this to be true. It appears therefrom that the lake could have been no lower than the previous fall. There is certainly no evidence that the defendant or Thomas, the caretaker, knew of any difference in the location of the raft or the depth of the lake which they were under obligation to impart to a licensee.

Plaintiff cites a great number of cases where proprietors of bathing pools or resorts, to which the public is invited and admission is charged, were held liable for injuries to bathers. These are cases where the person injured had entered a pool or beach run for profit under circumstances where he was clearly a business invitee and generally negligence is quite clearly shown. They are not applicable to the case before us.

We are unable to find that negligence on the part of the defendant has been proved and negligence cannot be inferred from the accident. Nolan v. Young Men's Christian Assn., 123 Neb. 549, 243 N. W. 639.

Defendant assigns as error that the trial court should have ruled plaintiff assumed the risk in diving as he did as a matter of law. The plaintiff's testimony shows he was an expert diver. He has been diving since he was 7 or 8 years old. He learned to swim in Sweden when he was 6 years old. In Sweden he swam in lakes with gravel, dirt, or rock bottoms and had taken tests in long-distance swimming. The "Kandidat" medal had been awarded him. This was the next to the top medal of which there was a series of 6 graduating in excellence of performance. In one test he swam a mile and a half; in another under water for 40 yards. In diving he picked up plates at a depth of 15 feet. He picked up 8 of 9 plates when 6 was passing. Likewise he was given, and passed, tests requiring swimming with clothes one-half mile, including boots above the ankle. Life saving tests were given. Dives were made from 10 feet and 30 feet. In Sweden he swam in water with ice about him and at times where holes were cut in

the ice. He swam in the Baltic Sea at shores, on beaches, and amid rocks. Plaintiff was familiar with the danger of diving in shallow water. In strange places he checked the depth by looking in the water. In Sweden the water was clear and he could see a considerable distance in it.

Plaintiff had been an employee of defendant since September 1951, and lived in Omaha since September 1952. He had used the recreation area at Kiewit Lake frequently since the winter of 1952 to 1953, when he first went there on a picnic with friends. Since that time he had used the cabin at the premises between 25 and 30 times. He started swimming from the dock in the summer of 1953, and had last used it in October 1956. Plaintiff testified he had been swimming at the lake on his visits 23 to 27 times and used this dock every time from 3 to 5 or 6 times, and dove from the same place with the same kind of a dive two dozen times. Plaintiff estimates it would take 5½ feet of water to execute this dive, which he had been doing for more than 25 years. An expect, Rex Aubrey, who testified on behalf of the plaintiff in answer to a hypothetical question, stated it would take 6 to 8 feet of water to make this type of dive. There were never any signs showing the depth of the water and plaintiff had no conversations with Thomas concerning its depth.

The exact cause of the injury of plaintiff is not clearly shown. The testimony shows there was no object in the lake that he could have hit. There is some evidence by the plaintiff's wife, a nurse, and an uncle, who visited him at the hospital, that he had a mark on the top of his head. His uncle described it as a reddish-blue mark, a little to the front of center of the top of his head about the size of the end of a thumb. This is not corroborated by anything the doctor says he observed. The only notes the nurse was able to find in the hospital record indicated hot packs applied to the right side of the head. This is perhaps sufficient for the jury to conclude that the

defendant hit the bottom of the lake. The dive was from the dock at an angle of 30° towards the lake and 8 feet out in that direction from the dock. He entered the water at an angle of 45° with the surface of the lake.

He was an experienced swimmer and diver, thoroughly familiar with the premises involved. It seems impossible for him to have gone swimming and diving from this dock on so many occasions without understanding the nature of this dug lake; that it was fed by surface water and underground seepage; and that its depth was not always constant or its bed uniform. He went there on March 10, 1957, which, at least for swimming, is considered still winter in Nebraska. It was almost 2 months before others swam there. He was the last person there in the fall before and had left his swimming suit. The ropes on the stakes had been taken from the poles which the year before had marked off the area of 3-foot water for bathing. They had not been replaced. The conversation of the wife with Thomas indicates that all three knew it was unusual to swim at the lake at that time of year. After going to the dock and looking down at the water without being able to see the bottom, though he says he could see 4 feet into its depth, he, without any further steps to determine its depth at the time, dove into the lake without going to the front of the dock or upon the diving board. It is lamentable that the plaintiff was so seriously injured. Whether it takes 5½ feet of water to make the particular dive, or 6 to 8 feet, as testified by the expert Rex Aubrey, it plainly appears that the plaintiff before diving should have checked the depth of the water and the uniformity of the lake bed, and his memory of both from previous years. When with his knowledge of the premises and his experience in diving he dove without taking such precautions, he assumed the risk involved in the venture. McCullough v. Omaha Coliseum Corp., 144 Neb. 92, 12 N. W. 2d 639.

Having found no negligence attributable to the defendant and that the plaintiff assumed the risk of diving under the circumstances shown from the evidence, it becomes unnecessary to discuss whether or not the plaintiff was also barred from recovery because of contributory negligence on his part.

It follows that the motion of the defendant for judgment notwithstanding the verdict should have been sustained and the plaintiff's petition dismissed.

The judgment is reversed and the cause remanded with directions to enter judgment notwithstanding the verdict dismissing the plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

STATE OF NEBRASKA EX REL. CITY OF GRAND ISLAND, A MUNICIPAL CORPORATION IN HALL COUNTY, NEBRASKA, APPELLEE, V. CHARLES TILLMAN, COUNTY ASSESSOR, IN AND FOR HALL COUNTY, NEBRASKA, APPELLEE, LUMAN H. ALBERTI ET AL., INTERVENERS-APPELLANTS.

115 N. W. 2d 796

Filed June 15, 1962. No. 35203.

1. **Parties.** Section 25-328, R. R. S. 1943, permitting intervention before trial as a matter of right, does not prevent a court of equity in the exercise of its discretion and in the furtherance of justice from allowing intervention after judgment to protect inherent rights of the parties seeking intervention.
2. ———. The interest required as a prerequisite of intervention is a direct and legal interest of such character that the person seeking to intervene will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
3. **Equity: Appeal and Error.** A court of equity should, upon proper application, be sure that the rights of all persons before it are protected and that they be given the right to appeal from an adverse judgment.
4. **Municipal Corporations.** The power conferred upon municipal corporations by their charters to make ordinances on specified

subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects.

5. ———. A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the Legislature and when so conferred must be exercised in strict accord with the statute conferring it.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded with directions.

Harry Grimminger, John A. Wagoner, and Baylor, Evnen, Baylor & Urbom, for appellants.

Paul C. Holmberg and E. G. Kroger, for appellee City of Grand Island.

Heard before SIMMONS, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

CHADDERDON, District Judge.

This is a mandamus action brought by the City of Grand Island, which will be referred to herein as city, against Charles Tillman, County Assessor in and for Hall County, Nebraska, who will be called Tillman in this opinion. After the trial court had allowed a peremptory writ of mandamus and had overruled Tillman's motion for a new trial, Luman H. Alberti and Phyllis M. Alberti, herein called Albertis, filed an application to intervene for the purposes of appeal. The trial court denied the Albertis the right to intervene. The Albertis filed a motion for new trial which was overruled, and the matter was appealed to this court.

The city, in its amended motion and affidavit for writ of mandamus, alleges among other things that it is a city of the first class with a population of more than 25,000 and less than 40,000, and has been operating under a home rule charter since June 3, 1928; that on

August 29, 1961, at a special meeting of the city council, the city passed an ordinance annexing certain territory set out in the ordinance, a description of which is unnecessary; that on August 30, 1961, said ordinance was published in Grand Island; that on August 31, 1961, the city filed a certified copy of the ordinance together with a plat of the property described therein in the office of the register of deeds of Hall County, Nebraska; that on September 20, 1961, the city council unanimously passed a resolution directing the city attorney to make a demand on Tillman to place the property on the tax assessment records of the city; that on September 21, 1961, such a demand was made on Tillman, and that he refused to place the property on the tax assessment records of the city; and that it did not have an adequate remedy at law. It prayed that the court issue an alternative writ of mandamus directing Tillman to place the property on the assessment records of the city. Tillman filed a return and answer, and the action was tried to the court. The court entered a writ of peremptory mandamus. Tillman filed a motion for new trial which was overruled by the court. Thereafter an application was filed by Albertis to intervene for the purpose of appeal, which application was denied. The Albertis filed a motion for new trial, which was overruled, and the action was appealed to this court. The evidence was such that the trial court could have found that the ordinance was passed in accordance with law, and that finding is not questioned. The other evidence necessary for decision herein will be set forth as occasion arises.

The first matter to be decided is, should the Albertis have been allowed to intervene 2 days after the court had overruled the motion for new trial filed by Tillman? This proposition consists of three questions: (1) Under our law could they intervene after the trial of the case? (2) Did the petition show a right to intervene? (3) Were they guilty of laches in failing to intervene before trial?

In Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co., 126 Neb. 744, 254 N. W. 507, the court said: "We meet the contention, made for the first time in this court, that parties cannot come into a case by intervention after judgment. Section 20-328, Comp. St. 1929, provides: 'Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.' We have passed directly upon this matter in several cases. 'In the first place the contention of the appellee that a statutory petition in intervention must be filed before trial must be conceded. But there are two kinds of intervention—that provided by section 7609, Rev. St. 1913 (now section 20-328, Comp. St. 1929) which, we have decided in common with the courts of other states having like provisions, is a matter of right, and which requires no leave to be granted by the court. In such a case the intervener can only file as a matter of right before the trial. * * * The other kind of intervention is that which prevailed in this state before the enactment of the statute mentioned, and which, while not an ancient procedure in courts of equity (note at page 281, 123 Am. St. Rep.), has been adopted by many courts as essentially equitable in its nature, and which may be allowed by a court of equity in its discretion in a proper case.' State v. Farmers State Bank, 103 Neb. 194.

" 'It is first argued that a petition to intervene must be filed before trial, that the right of intervention terminates with the final decree, and that the trial court

erred in overruling the motion to strike intervener's pleadings from the record. In this connection reference is made to the statutory right of intervention before trial. Comp. St. 1922, sec. 8552 (now Comp. St. 1929, sec. 20-328). Intervention under this statute is a matter of right, but does not prevent a court of equity in the interests of justice from allowing a proper party to intervene after the trial has begun. State v. Farmers State Bank, 103 Neb. 194. Was intervention properly allowed 17 days after entry of the unexecuted decree of foreclosure? Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule. In the light of both reason and precedent it has been said: "Applications for leave to intervene after entry of a final decree are unusual, and generally have been denied. There are instances, however, where petitions for leave to intervene have been filed and granted after decree." 21 C. J. 345.' Engdahl v. Laverty, 110 Neb. 672. See, also, 21 C. J. 341-343, 345, and notes; Brown v. Brown, 71 Neb. 200; Ward v. Clark, 6 Wis. 509; Webb v. Patterson, 114 Neb. 346."

This court in Kirchner v. Gast, 169 Neb. 404, 100 N. W. 2d 65, said: "We have held: 'The interest in a matter in litigation which will authorize a person to so intervene must be such a direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. * * * Such an interest must be one arising from a claim to the subject matter of the action or some part thereof or a lien upon the money or property or some part thereof, as distinguished from an indirect, remote, or conjectural interest in the result of the suit which is not enough to permit intervention.' Gilbert v. First Nat. Bank, 154 Neb. 404, 48 N. W. 2d 401."

Again in Noble v. City of Lincoln, 158 Neb. 457, 63

N. W. 2d 475, the court said: "Appellants challenged the petition in intervention by general demurrer. It was overruled. The interveners alleged that they were taxpayers and electors of the city of Lincoln and that they had an interest in the matter in litigation in this suit. There is statutory authority for any one who has or claims an interest in the matter in litigation to become a party to the action. § 25-328, R. R. S. 1943. The interest required is a direct and immediate legal interest of such a character that the person seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. The ultimate facts must be alleged by him evidencing his interest in the matter in litigation and an averment that he has an interest in the subject matter is a conclusion and is not sufficient to permit intervention. Schroder v. City of Lincoln, 155 Neb. 599, 52 N. W. 2d 808; Drainage District v. Kirkpatrick-Pettis Co., 140 Neb. 530, 300 N. W. 583; Cornhusker Electric Co. v. City of Fairbury, 131 Neb. 888, 270 N. W. 482. Contrary to any claim that there was fraud, inefficiency, or lack of diligence on the part of appellees in their efforts herein to assert and protect the rights of the city, its officers, and inhabitants, the petition of the interveners asserts that the city of Lincoln is defending the suit 'on the basis of its good faith.' This negatives any inference of fraud, collusion, or inattention or that their interest in the litigation as taxpayers was not being properly represented. Taxpayers are not qualified to intervene in matters of public interest that are prosecuted or defended for a governmental subdivision by its proper officials. Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150; City of Omaha v. Douglas County, 125 Neb. 640, 251 N. W. 262; State ex rel. Randall v. Hall, 125 Neb. 236, 249 N. W. 756."

With these rules of law in mind let us examine the facts in this case so far as they relate to the matter of intervention. The Albertis allege in their application,

which allegations are sustained by the evidence, in substance that they are representing themselves and all other persons similarly situated; that they own real estate situated in the area involved in this suit; that the question of whether or not the city had met the requirements of the statutes for annexation was determined by the trial court; that Tillman had undertaken to defend this action; that his attorney had publicly stated on various occasions that he would carry the case to the Supreme Court and they had relied upon these statements; that upon learning that an appeal might not be taken they requested Tillman to take the necessary steps to appeal the case to the Supreme Court; that they would guarantee the payment of costs for such an appeal; and that their interest in this matter was a determination of whether or not the annexation of the territory involved herein, part of which was their land, became a part of the city of Grand Island.

The Albertis were in the position of having their interests protected by Tillman, whose attorney had publicly announced that regardless of the result in district court the case would be appealed to the Supreme Court. Just before the court announced its ruling on the motion for new trial Tillman announced that if the ruling was adverse he would not appeal. Two days later they filed an application to intervene, which we think was a reasonable time.

A court of equity should, upon proper application, be sure that the rights of all parties before it are protected and that they be given the right to appeal from an adverse judgment.

We determine that the Albertis could intervene after the motion for a new trial was overruled; that the application was sufficient to show that they had such an interest in the suit to allow them to intervene and that they did so as soon as possible after they learned that Tillman would not appeal the case; and that the trial

court should have allowed their application to intervene for the purpose of appeal.

We now come to the assignments of error on the merits of the case. These may be described as involving four questions: (1) Did the annexation ordinance passed by the city meet the requirements of the State of Nebraska and its home rule charter? (2) Was it necessary for the City of Grand Island to comply with the provisions of sections 16-107, 16-108, and 16-109, R. R. S. 1943? (3) Are these sections of the statute unconstitutional? (4) Was the question of constitutionality of these statutes raised in the trial court?

With regard to the first question the city in its amended motion and affidavit for writ of mandamus sets out its home rule charter with regard to the extension of the city limits and annexation of territory as follows: "The corporate limits of the City shall remain as heretofore and the Mayor and Council may by ordinance include therein all the territory contiguous or adjacent, which has been by the act, authority or acquiescence of the owners subdivided into parcels containing not more than five acres, and the Mayor and Council shall have the power by ordinance to compel the owners of land so brought within the corporate limits, to lay out streets, ways and alleys to conform and be continuous with the streets, ways and alleys of such city, and vacate any public road heretofore established through such land when necessary to secure regularity in the general system of its public ways." It further alleges that the home rule charter also provides: "Saving to itself all other rights and powers that are now or may hereafter be given the city on general law."

The ordinance involved herein does not comply with the provisions of its home rule charter as it now exists because the stipulation in this case provides in paragraph VI thereof: "It is further stipulated that all of the area included in the ordinance involved in this case had been subdivided or platted into tracts of

twelve acres or less, but one or more of said tracts or parcels of land are subdivided into parcels which contain in excess of five acres, all of said subdivisions having been made prior to the passage of the ordinance of annexation, with the exception of one tract of twenty acres owned by the Grand Island School District, and that tract was included at the request of said School District." We see that several tracts contain in excess of 5 acres and one tract is 20 acres. Thus we are only concerned with the statutes of Nebraska which provided for the annexation of property to the city.

There are two methods of annexing territory to a city of the first class, both of which are provided for in sections 16-106, 16-107, 16-108, 16-109, and 16-112, R. R. S. 1943, as amended. Section 16-112, R. R. S. 1943, provides that the owner of any land contiguous to the corporate limits shall plat the same as described therein, obtain the approval of the mayor and council, and file the same in the office of the register of deeds, and then such tract shall be included within the city for all purposes. This method was not used in this instance, but rather the method provided in sections 16-106, 16-107, 16-108, and 16-109, R. R. S. 1943, as amended. Section 16-106, R. S. Supp., 1961, provides as follows: "The corporate limits of such city shall remain as before and the mayor and council may by ordinance include therein all the territory contiguous or adjacent, which has been by the act, authority, or acquiescence of the owners subdivided into parcels containing not more than twelve acres and any tract consisting of twelve or more acres which is entirely surrounded by land already embraced within the corporate limits of said city, except as provided by section 19-2504. The mayor and council shall have power by ordinance to compel the owners of lands so brought within the corporate limits to lay out streets, ways, and alleys to conform to and be continuous with the streets, ways, and alleys of such city, and may vacate any public road heretofore established through such

land when necessary to secure regularity in the general system of its public ways." With this in mind let us examine the cases decided by this court in regard to the annexation of territory by cities of the first class. In Chicago, B. & Q. R.R. Co. v. City of Nebraska City, 53 Neb. 453, 73 N. W. 952, the court said: "The adoption of said ordinance was wholly insufficient to change the boundaries of the municipality. The statute at that time in force designated the mode for the annexation of adjacent territory to a city of the first class having less than 25,000 inhabitants. (Compiled Statutes 1891, ch. 13a, art. 2, secs. 4, 6.) The one for which provision is made in said section 4 permits such annexation to be accomplished by the passage of an ordinance by the mayor and council extending the corporate limits so as to include territory contiguous or adjacent to the city, which by the authority or acquiescence of the owner has been subdivided into tracts or parcels containing not to exceed five acres. The record fails to establish that the real estate sought to be annexed by the ordinance in question had been subdivided by the owner into parcels of the size specified by said section 4. It is true the amount of land attempted to be added to the city does not exceed five acres, but that is an unimportant consideration, and does not meet the legislative requirement that the contiguous territory must have been subdivided by the proprietor into parcels of not to exceed five acres, in order to entitle the same to be attached to the corporation by the mere passage of an ordinance ordering it to be annexed. It is a familiar doctrine that municipal corporations can exercise only such powers as are conferred by law, either expressed or implied. Where the statute points out the mode of procedure for the extension of the boundaries of a city, the same must be substantially followed, else it will be of no validity."

In that case the court held that the annexation ordinance was not valid because the territory sought to be annexed was not divided into lots as provided in the

statutes in effect at that time, and held that the interpretation of annexation statutes should be strictly construed.

In Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490, the court set out the rules with regard to the interpretation of annexation statutes both under the home rule charter and the statutes. In that case the court said: "Annexation of territory under this authority is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the lands to be annexed. Campbell v. Youngson, 80 Neb. 322, 114 N. W. 415; Winkler v. City of Hastings, 85 Neb. 212, 122 N. W. 858; Witham v. City of Lincoln, 125 Neb. 366, 250 N. W. 247.

" 'Constitutional and statutory limitations on the nature and extent of the territory which may be annexed to a municipal corporation must be observed.' 62 C. J. S., Municipal Corporations, § 46, p. 130.

"In doing so it is not for the courts to determine what portions might be properly annexed, for the fixing of boundary lines under this authority is a legislative act. State ex rel. Davis v. City of Largo, 110 Fla. 21, 149 So. 420; City of Houston v. State ex rel. City of West University Place, 142 Tex. 190, 176 S. W. 2d 928.

"The home rule charter adopted by the city of Omaha is a grant as distinguished from a limitation of power. Being a grant of power the charter is to be construed according to the same rules as a legislative act containing the same provisions in determining what authority is thereby granted the city government. Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643; Falldorf v. City of Grand Island, 138 Neb. 212, 292 N. W. 598.

" 'A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore possesses no power or faculties not conferred upon it, either expressly or by fair

implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it.

" 'The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects.' Reid v. City of Omaha, *supra*. See, also Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649.

" 'A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided for by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the legislature, and when so conferred must be exercised in strict accord with the statute conferring it.' 37 Am. Jur., Municipal Corporations, § 24, p. 640."

In that case the annexation ordinance included what the court found to be agricultural lands and as a result it declared the whole ordinance void, saying: "In view of the foregoing we have come to the conclusion that the city, by including these agricultural lands which are rural in character in the area sought to be annexed, exceeded the authority granted it by section 14-117, R. S. 1943. Since we have no authority to revise the boundary line of the city, as extended by the ordinance, we find that its doing so makes the entire ordinance invalid."

With these rules in mind let us examine the evidence in this case. The stipulation entered into by the parties as set forth above states that one tract owned by the Grand Island school district was included at the request of said district. Since that tract was more than the legal maximum which the statute allowed, and since the Grand Island school district did not comply with the provisions of section 16-112, R. R. S. 1943, the city did not have the authority to extend its boundaries over that real estate, and we find that the entire ordinance

was invalid. In view of these findings, it is unnecessary to decide whether or not the city was required to comply with the provisions of sections 16-107, 16-108, and 16-109, R. R. S. 1943. The same is true with regard to the constitutionality of these statutes and also as to whether or not the constitutionality of these statutes was properly raised in the court below. These questions therefore are not passed upon.

The judgment of the trial court is reversed and the cause remanded with directions to enter a judgment of dismissal, with costs both in this court and in the district court to be paid by the City of Grand Island.

REVERSED AND REMANDED WITH DIRECTIONS.

NILE VALLEY FEDERAL SAVINGS & LOAN ASSOCIATION, APPELLEE, V. ERNEST W. SCHANK ET AL., APPELLANTS, IMPLEADED WITH DONALD D. BASTEMEYER ET AL., APPELLEES.

115 N. W. 2d 774

Filed June 15, 1962. No. 35232.

1. **Evidence: Appeal and Error.** This court will not take judicial notice of the rules of practice of the district court.
2. **Appeal and Error.** The rules of practice in a district court, alleged to have a material bearing on the rulings complained of, before they can enter into a determination of a question presented in this court, must be incorporated in the bill of exceptions.
3. ———. In the absence of a bill of exceptions, it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.
4. ———. In the absence of a bill of exceptions containing the evidence, an order made by the district court confirming sale of real estate is presumed to be correct and supported by sufficient evidence.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Straight Townsend, for appellants.

Donald L. Wood, Neighbors, Danielson & Van Steenberg, and Willis A. Herman, for appellee Nile Valley Fed. Sav. & Loan Assn.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an appeal from an order overruling a motion to set aside an order of confirmation of a judicial sale in a mortgage foreclosure.

Nile Valley Federal Savings & Loan Association is plaintiff and appellee. The appellants are Ernest W. Schank and Ivah May Schank, who were the mortgagors and will be hereinafter referred to as defendants.

There is no bill of exceptions and the proceedings in the transcript start with the decree of foreclosure. The return of the sheriff indicates that the property in question was sold pursuant to the foreclosure decree on January 5, 1962. Subsequent thereto, and on the same day, an order of confirmation was entered. This order of confirmation reads in part: "* * * the court, having carefully examined the proceedings of the officer and being satisfied that the sale of said real estate was in all respects made in conformity to the process of law governing the same, and that said real estate was sold for a fair value under the circumstances and conditions of the sale, and that a subsequent sale would not realize a greater amount, the court therefore finds that said sale should be confirmed."

On January 11, 1962, or 6 days thereafter, a motion was filed by the defendants for an order setting aside the order of confirmation. Attention was directed to rule No. 18 of the rules of practice and procedure for the district court for Scotts Bluff County, Nebraska, which provided that at least 4 days must elapse after a judicial sale before confirmation. The only reason

given by the motion for the relief sought is in the fourth paragraph of the motion and is as follows: "The order of confirmation was entered so soon after the said sale and the return of sale that these defendants had no reasonable opportunity to make objections thereto, *if any they may have had.*" (Italics supplied.)

The motion was heard and overruled on January 17, 1962. There is in the transcript a copy of what purports to be rule No. 18 of the rules of the district court of the Seventeenth Judicial District of Nebraska, adopted December 30, 1958. It reads as follows: "Except by consent of parties, judicial sales shall not stand for confirmation until the fourth day after the day of sale unless otherwise ordered by the court. No motion, notice or 'first order' shall be necessary as a condition precedent to confirmation."

As stated, there is no bill of exceptions. If this rule or any other evidence was offered on the motion, it is not now before us for consideration. This court will not take judicial notice of the rules of practice of the district court. Dunn v. Bozarth, 59 Neb. 244, 80 N. W. 811.

The defendants' assignments of error are disposed of by what we said in Federal Farm Mtg. Corp. v. Hughes, 137 Neb. 820, 291 N. W. 475: " 'The rules of practice in a district court, alleged to have a material bearing on the rulings complained of, before they can enter into a determination of a question presented in this court, must be incorporated in the bill of exceptions.' Jones v. Cleary, 2 Neb. (Unof.) 541, 89 N. W. 386."

If the rule was properly before us, and if it should be considered that the court had not "otherwise ordered," there is nothing in the motion filed by the defendants which in any way suggests that the sale was not fair or that it was irregular in any way. Nor is there any allegation that another sale would realize a greater amount than the one confirmed. We note also that the defendants did not file their motion within the 4 days

but waited until after that time had expired before moving on the order of confirmation.

In the absence of a bill of exceptions, it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. Schroeder v. Homestead Corp., 171 Neb. 792, 107 N. W. 2d 750. The only pleadings in the record, as suggested, start with the decree of foreclosure, and there is no contention that the pleadings are inadequate to support the order of confirmation. The order made specific findings which are undisputed in this record.

We dispose of this appeal under the general rule enumerated in Federal Farm Mtg. Corp. v. Hughes, 137 Neb. 820, 291 N. W. 475: " 'In the absence of a bill of exceptions containing the evidence, an order made by the district court confirming sale of real estate is presumed to be correct, and supported by sufficient evidence.' "

It follows that the judgment of the district court is correct, and it is affirmed.

AFFIRMED.

SIMMONS, C. J., not participating.

PHYLLIS SPATH, APPELLANT, V. HAMILTON H. MORROW ET AL., APPELLEES.
115 N. W. 2d 581

Filed June 15, 1962. No. 35242.

Physicians and Surgeons: Limitations of Actions. A cause of action for malpractice based upon the alleged failure of a physician to remove a foreign object left in the body of a patient by mistake does not accrue until the patient discovers, or in the exercise of reasonable diligence should have discovered, the presence of the foreign object.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Reversed and remanded.

Tesar & Tesar, for appellant.

Sidner, Lee, Gunderson & Svoboda, for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

BOSLAUGH, J.

This is an appeal in an action for malpractice. The amended petition alleged that the plaintiff was hospitalized at Fremont, Nebraska, on July 10, 1951, for the delivery of a child; that the plaintiff had been under the care of Dr. Carl H. L. Stehl; that Dr. Stehl referred the plaintiff to his agent, the defendant Dr. Dorwin B. Wengert, in accordance with an arrangement whereby Dr. Wengert would care for the patients of Dr. Stehl while Dr. Stehl was absent from the county; that Dr. Wengert, as agent for Dr. Stehl, retained the defendant Dr. Hamilton H. Morrow to assist in the delivery; that in assisting with the delivery Dr. Morrow acted as an agent for Dr. Stehl, knew that the plaintiff was originally a patient of Dr. Stehl, and that Dr. Stehl was absent from the county; that following the delivery and while suturing the plaintiff, the defendants broke a suture needle and a part of the needle was left in the soft tissue of the left perineum in the plane of the symphysis; that the defendants should have known that a part of the needle was left in the body of the plaintiff but negligently failed to discover and remove the needle and failed to disclose to the plaintiff that a part of the needle had been left in her body; that the defendants had a continuing duty to discover and remove the needle and their failure to do so was a fraudulent concealment and continuing negligence and a failure to complete the operation; that immediately after the delivery plaintiff had difficulty and disability caused by the presence of the needle; that Dr. Stehl resumed the care of the plaintiff 1 week after the delivery and she continued

under his care until June 13, 1960, when Dr. Stehl informed the plaintiff that the needle was in her body; that the needle was removed on January 23, 1961; that the plaintiff did not or through the use of reasonable diligence could not discover the presence of the needle until she was informed of the fact by Dr. Stehl; that the plaintiff believed, relied, and acted on the representations of Dr. Stehl as to the cause of her difficulty and disability; and that the plaintiff was damaged as a result of the negligence of the defendants.

The defendants filed separate general demurrers which alleged that the action was barred by the statute of limitations. The demurrers were sustained. The plaintiff elected to stand upon her amended petition and the action was dismissed. The plaintiff has appealed from the judgment dismissing the action.

The issue presented by the appeal is very narrow. The delivery is alleged to have occurred on July 10, 1951. The plaintiff is alleged to have not discovered or have been able to discover the presence of the needle in her body until June 13, 1960. The action was commenced on May 29, 1961. The statute requires that an action for malpractice be brought within 2 years after the cause of action shall have accrued. § 25-208, R. R. S. 1943. The question to be determined is when the cause of action accrued.

The general rule is that a cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. Dewey v. Dewey, 163 Neb. 296, 79 N. W. 2d 578. There are, however, many exceptions to this general rule.

In Williams v. Elias, 140 Neb. 656, 1 N. W. 2d 121, the plaintiff alleged that on April 4, 1938, he fractured the laminae of the fifth lumbar vertebra and injured the sacroiliac joint and surrounding muscles and tendons; that the defendant physician incorrectly diagnosed his injury as lumbago and failed to properly treat him for

his injuries; that the defendant physician continued to treat him until August 15, 1938, when he was hospitalized at Omaha, Nebraska, examined, X-rayed, and the nature of his injuries ascertained and treated; and that as a result of the improper diagnosis and treatment, his spinal column and sacroiliac joint became deformed, stiff, and enlarged and the left sciatic nerve impinged. This court held that the statute of limitations did not commence to run until August 15, 1938, the date that the treatment by the defendant physician ended.

The defendants contend that the rule announced in the Williams case is applicable here and that the statute of limitations commenced to run in this case on or about July 17, 1951, the date on which Dr. Stehl is alleged to have resumed the care of the plaintiff. This would result in the plaintiff's cause of action being barred nearly 7 years before it is alleged that she was informed as to the cause of her difficulty following the delivery. We do not believe that this is what the Legislature intended.

The statute of limitations is a statute of repose; it prevents recovery on stale demands. In re Estate of Anderson, 148 Neb. 436, 27 N. W. 2d 632. The statute is enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the right to proceed. The basis of the presumption is gone whenever the ability to resort to the courts is taken away. Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545. The mischief which statutes of limitations are intended to remedy is the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert. 34 Am. Jur., Limitation of Actions, § 10, p. 20. If an injured party is wholly unaware of the nature of his injury or the cause of it, it is difficult to see how he may be charged with a lack of diligence or sleeping on his rights.

The Supreme Court of Pennsylvania recently com-

mented upon the unusual situation of a patient who has a foreign object left in his body by mistake. In Ayers v. Morgan, 397 Pa. 282, 154 A. 2d 788, the plaintiff alleged that he did not know that the defendant surgeon had left a metallic gauze sponge in his abdomen until it was discovered there 9 years later. In holding that the cause of action was not barred by the statute of limitations the court said: "Did the laws of nature prevent Ayres from ascertaining what was causing the pain in his abdomen? Certainly he could not open his abdomen like a door and look in; certainly he would need to have medical advice and counsel; certainly he would have to be dependent upon those who with appropriate instruments and devices could pierce the wall of flesh which hid from his own eyes the cause of his wretchedness."

The statutes of New Jersey require that an action for malpractice shall be commenced within 2 years after the cause of action shall have accrued. In a recent case, Fernandi v. Strully, 35 N. J. 434, 173 A. 2d 277, the plaintiff alleged that the defendant surgeon negligently left a wing nut from a retractor in his body. The Supreme Court of New Jersey held that the cause of action accrued when the plaintiff knew or had reason to know about the foreign object and the existence of the cause of action based upon its presence. The court observed that foreign object malpractice cases present special considerations which set them apart from other cases. The court said: "They involve the confidential doctor-patient relationship, the negligent failure to remove a foreign object during the course of the doctor's operation on his patient, the patient's total ignorance during the customary period of limitations of that fact or of circumstances suggesting it, the later discovery of the foreign object and the material harm it had done and the patient's expeditious institution of legal action thereafter. These circumstances eliminate the danger of a belated false or frivolous claim."

The cases which have considered this question are collected and discussed in a recent annotation appearing in 80 A. L. R. 2d 368, and in earlier annotations appearing in 144 A. L. R. 209 and 74 A. L. R. 1317. The cases from other states are in conflict and the defendants have cited a number of cases which support the ruling of the trial court in this case. However, we believe the following statement of the New Jersey court in Fernandi v. Strully, *supra,* is pertinent: "It is significant to us that in malpractice actions, particularly where, as here, they involve foreign objects, an ever increasing number of jurisdictions have used one just legal approach or other to avoid the truly harsh result reached in Weinstein."

In Williams v. Elias, *supra,* this court took note of the mutual confidence which is essential in the relation between physician and patient; that the physician should have a reasonable opportunity to correct the mistakes incident to even skilled surgery; and that the physician should not be harassed by premature litigation instituted in order to save the rights of the patient. Patients should not be encouraged to go from physician to physician in an effort to ascertain whether the diagnosis made and the treatment received are proper. Silence on the part of the physician for the statutory period should not destroy the rights of the patient.

We conclude that the cause of action in this case did not accrue until the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, that a foreign object had been left in her body. The demurrers of the defendants should have been overruled. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

BLANCHE I. LIGHT ET AL., APPELLANTS, V. ETTA ASH ET AL., APPELLEES.

115 N. W. 2d 903

Filed June 22, 1962. No. 35156.

1. **Trusts.** When a person obtains the legal title to real estate belonging to another by means of fraud or misrepresentation, actual or constructive, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. A court of equity will enforce such a trust for the benefit of the grantor or those claiming under him.
2. **Trusts: Frauds, Statute of.** Trusts arising by implication, or by operation of law, are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception.
3. **Fraud.** The existence of an intent to defraud at the time the promise was made may be inferred from the failure to comply with the promise, and the promisor may be presumed to have intended, when he made the promise, to do what he finally did do with respect thereto.
4. **Trusts: Equity.** If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title.
5. **Trusts.** A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
6. ———. In such cases the promise need not be express in order to raise a constructive trust, actual cooperation and silent acquiescence on the part of the grantee being sufficient where he has knowledge of the grantor's intention and understanding of the transaction.
7. ———. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character.

Appeal from the district court for Custer County: S. S. SIDNER, Judge. Affirmed.

Edwin J. Myers, Frank E. Edgerton, and William L. Andrews, for appellants.

Carlos C. Schaper, Beatty, Clarke, Murphy, Morgan, Pederson & Piccolo, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

BROWER, J.

This is an action brought in the district court for Custer County by the plaintiffs and appellants Blanche I. Light and Allen Light, her husband, Fern Ellingson and Melvin Ellingson, her husband, and Alonzo Boyd Ash, against Etta Ash, Criss B. Ash and Frieda Ash, his wife, Etta Ash as administratrix of the estate of Alonzo B. Ash, deceased, and the Federal Land Bank of Omaha, a corporation, defendants and appellees.

Hereafter the parties will be referred to as plaintiffs or defendants, as they were designated in the trial court. Alonzo Boyd Ash will be designated as Boyd Ash, which name he generally used and to further distinguish him from his deceased father.

The action sought a judgment declaring and raising a constructive trust with respect to the title to two tracts of farm lands in Custer County. Plaintiffs prayed that the defendants Criss B. Ash and his wife Frieda Ash, and Etta Ash, who held and had held the legal title to the property, be found and adjudged to be trustees holding an equitable undivided one-fourth interest for each of the plaintiffs Blanche I. Light, Fern Ellingson, and Boyd Ash. It further sought a judgment requiring the defendant Criss B. Ash to pay or secure the discharge of a $4,500 mortgage placed on the premises by the defendants Criss B. Ash and wife, and Etta Ash in favor of the defendant Federal Land Bank of Omaha, or that said amount and mortgage be held to be a lien upon the remaining one-fourth interest in the premises

alleged to be in the defendant Criss B. Ash.

Before the trial of the cause in district court the defendant Etta Ash died and the action was revived as to her interest in the name of Criss B. Ash, special administrator of her estate. Likewise the plaintiff Fern Ellingson passed away and Melvin Ellingson, executor of her estate, was substituted as party plaintiff. The Federal Land Bank of Omaha filed a demurrer which was sustained and it was dismissed from the action. Allen Light appeared before trial and dismissed the action so far as he was concerned.

The factual situation from which this dispute grew arose in the following manner: Alonzo B. Ash, a farmer residing near Broken Bow, Nebraska, owned the two farms in question prior to his death. While he and his wife Etta Ash were visiting their son Criss B. Ash, who was then living in California, he died on December 24, 1937, intestate, leaving his widow Etta Ash and his children, the plaintiffs, Blanche I. Light, Fern Ellingson, and Boyd Ash, and the defendant Criss B. Ash, as his only heirs-at-law. His remains were brought back to Broken Bow for burial and the funeral was held there on December 29, 1937. On the morning of December 30, 1937, a meeting took place at the Ash farm home at which Etta Ash, the widow, and all of the children of the deceased, except Boyd Ash, who was then in Idaho, were present. A banker, T. T. Varney, and a lawyer, William C. Schaper, came to the home that day also and were present at the family gathering. Schaper brought with him a quitclaim deed to all the land and an assignment of all the personal property of the estate. In these instruments Etta Ash was grantee and assignee, respectively. The assignment contained a power of attorney naming Etta B. Ash as attorney in fact for the children of the deceased with respect to matters concerning the estate of Alonzo B. Ash. The deed and assignment were prepared for the signatures of the children then present and their spouses.

Both instruments were in the usual form and contained no reservation. The deed recited a consideration of $1 and love and affection and the assignment of love and affection only. They were executed by the children and their spouses at that time.

On the following day there was a meeting at the office of attorney Schaper. A similar deed for Boyd Ash and wife, Amber Ash, and a letter to Boyd Ash in Idaho were prepared by Schaper. According to the testimony of Schaper the letter was signed by all three children present, their mother, Etta Ash, and an uncle of the children, B. P. Ash. Boyd Ash who received it said to the best of his recollection it was signed by the three children and Frieda Ash, Allen Light, and the uncle. An unsigned carbon copy of it was identified and placed in evidence, the original not having been preserved. Its contents as far as pertinent is here set out:

"Dear Boyd: Mother has filed a petition to probate father's estate and is asking for her appointment as administratrix of the estate. Mr. Schaper and Mr. Varney were out home last night and we were all present when the petition for the probate of the estate was signed by mother. We have all signed a quit claim deed conveying our interest in the real estate to mother and we have all signed an assignment of interest in father's estate to mother. We have had Mr. Schaper prepare a quit claim deed for you and Amber to sign and also have had prepared an assignment of interest in father's estate for you to sign. The deed and the assignment of interest are identical with those which we have signed and delivered to mother, and we hope you will take the deed and the assignment of interest and you and Amber both sign these papers before a notary public and have your signatures witnessed and return these papers in the enclosed envelope to Schaper & Runyan, at Broken Bow.

"Now, Boyd, we all felt this was the proper thing to do, so that mother will have all of the estate to do with as she pleases as long as she lives. We sincerely hope

you will feel the same way about the matter and execute the papers prompty and mail them in the enclosed envelope. In addition to this letter we are writing you personally. As you will probably will know, this letter is dictated in the presence of all of us, but we will write separately."

The letter with the papers was duly sent to Boyd in Idaho. On January 5, 1938, Boyd Ash wrote and mailed a letter to Schaper & Runyan, the relevant portion of which is here set out:

"They write me there is no catch in my signing the quit claim deed. I realize that I am merely signing my rights from Dad to mother, but Mr. Schaper also I realize I am signing away my rights forever, (which is just what my mother wants) unless mother *chooses* to include me. Now, how well does she know that I am never to be included and besides just what will be left to be divided after she has deeded almost everything to Criss. It seems to me t'would be far more fair to have livestock & machinery divided, (not to own) to farm both places instead of Criss getting the use of machinery and all the livestock to farm both places.

"It has *always* been this way, Dad has always wanted to do what was fair (by me) (this is an awful thing to say) but my own mother would not let him. It has always been for Criss. Now all the reasons she would give for doing so I could name just as many."

On January 12, 1938, Schaper & Runyan answered. After explaining the presence of the family when the deed and assignment were signed it stated that his uncle had thought it best to have the letter signed by all. The letter contained the following paragraphs:

"Your mother has a friendly attitude toward you and at the present time has in mind that you two boys should later farm the places, and we believe you will get farther if you will take a cooperative attitude and work together with your mother and the family than if you retain an antagonistic attitude.

"It is true, however, that if you convey this property to your mother that you do so unconditionally and she could do with it as she pleases, but after all she is your mother and usually a mother will do the fair thing with her children. Every family at times has more or less differences but in the final annalysis (sic) the old saying that blood is thicker than water holds true. In all probability when you consider the circumstances you and your wife will not have any hesitancy in executing the papers and mailing them to us or your mother."

Boyd replied briefly on January 14, 1938, that he and his wife had decided on a settlement of the father's estate. Shortly thereafter Etta Ash, Blanche I. Light, and her daughter, and Criss and Frieda Ash made a trip to the residence of Boyd Ash at Fairfield, Idaho. Boyd hitched the team to the sled and got them from the place on the highway where they were stuck in the snow. After being there 4 or 5 days, Boyd Ash and wife executed a like quitclaim deed and assignment of the personal property of the estate of Boyd's father at Fairfield, Idaho, and delivered them to Etta Ash. The visitors left the day the papers were signed without returning to the ranch.

On October 19, 1953, Etta Ash deeded both farms to Criss B. Ash, reserving a life estate which was filed for record the same day. On February 2, 1953, she had made a will leaving everything to Criss except $1 for each of her other children and providing that any obligations owed by Boyd Ash to her should not be forgiven but should be collected by her executor. On June 10, 1959, Etta Ash died at the age of 87 years.

Approximately a year before his mother's death, Boyd Ash learned of the conveyance to Criss B. Ash and this suit was commenced.

Plaintiffs' petition set out the execution of the deeds and assignments. It further alleged in considerable detail that the deed and assignment executed on December 30, 1937, were procured by Etta Ash upon her oral as-

surances, promises, and agreement that she would retain the ownership of the property deeded and assigned during her lifetime, and neither deed nor mortgage them or permit any lien to be placed thereon; that she would manage and control the same, rent the same and collect the rents, pay the taxes and insurance, and maintain the buildings in good condition; and that upon her death the real estate and personal property would descend unencumbered to her four children Blanche I. Light, Fern Ellingson, Boyd Ash, and Criss B. Ash, share and share alike, together with any revenue therefrom not needed for the grantee's personal and living expense. It further alleged that the deed and assignment obtained on the trip to Idaho from Boyd Ash and wife were procured by means of similar oral representations and agreements to him; and that the oral promises, agreements, and representations of the defendant Etta Ash by which she procured said deeds and assignments were made by her with the fraudulent intent to deprive the plaintiffs of their share of their father's estate. It set out that they were induced to sign the same because of their love for the mother and their desire that she have the necessary rights and powers to manage the estate. It further set out that they believed their mother and accepted her promises, agreements, and representations in full faith and for that reason executed the deeds; that notwithstanding her solemn oral agreements and promises, Etta Ash executed the deeds to Criss B. Ash and thereby defrauded the plaintiffs and that the deeds to Criss were given for the purpose of defrauding them; that Criss B. Ash joined and confederated with his mother in an attempt to defraud the plaintiffs and in so doing well knew all of the promises and agreements of his mother; that plaintiffs did not discover the fraud until July 4, 1958, when they learned of said deeds to Criss; and that by reason of the complicity in the fraud of Etta Ash by Criss B. Ash, he and his mother are both estopped to deny the one-fourth

interest of each of the plaintiffs in said premises. Its prayer is to establish the constructive trust as heretofore mentioned.

The separate answers of Etta Ash and Criss B. Ash, so far as they are necessary to our decision, admitted the execution of the instruments set forth in the petition; denied the other allegations thereof; and set forth an indebtedness from Etta Ash to Criss B. Ash arising from the alleged furnishing of a home, care, and ministrations to Etta Ash in her old age. All affirmative allegations of the answers were denied by the plaintiffs' replies.

The matter proceeded to trial and at the conclusion of the evidence a motion to dismiss the plaintiffs' petition was made by counsel for defendants for the reason that the record and evidence were insufficient to sustain any judgment favorable to the plaintiffs. The court sustained the motion and dismissed the petition. Plaintiffs' motion for a new trial being thereafter overruled, they have brought their appeal to this court.

The general rules relating to constructive trusts have been quite clearly stated in decisions of this court. In Musil v. Beranek, 160 Neb. 269, 69 N. W. 2d 885, it was held: "When a person obtains the legal title to real estate belonging to another by means of fraud or misrepresentation, actual or constructive, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. A court of equity will enforce such a trust for the benefit of the grantor or those claiming under him.

"Trusts arising by implication, or by operation of law, are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception.

"The existence of an intent to defraud at the time the promise was made may be inferred from the failure to comply with the promise, and the promisor may be presumed to have intended, when he made the promise, to do what he finally did do with respect thereto.

"The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character."

The case of Box v. Box, 146 Neb. 826, 21 N. W. 2d 868, where a constructive trust was established laid down applicable rules in that case and of value here, stating: "If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title.

"A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.

"In such cases the promise need not be express in order to raise a constructive trust, actual cooperation and silent acquiescence on the part of the grantee being sufficient where he has knowledge of the grantor's intention and understanding of the transaction."

In McCormick v. McCormick, 150 Neb. 192, 33 N. W. 2d 543, the court in speaking of trusts of this character, said: "So reluctant are the courts to engraft a trust by parol on the legal title to real estate that there is perhaps no better established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence.

"When the person to whom a conveyance of real property is made is the wife, who is the natural object of the husband's bounty, it raises a presumption of a gift or settlement rather than of a trust. This presumption

is rebuttable." On these same questions, see, also, Nelson v. Seevers, 143 Neb. 522, 10 N. W. 2d 349.

The plaintiffs make 19 assignments of error to the ruling of the court but the following are the only ones we deem it necessary to discuss. They are that the trial court erred (1) in holding the evidence was insufficient to establish a prima facie case in favor of the plaintiffs; (2) in not finding that the relationship between Etta Ash and her four children was of such a confidential relationship as to prove a prima facie case of constructive trust; (3) in refusing to permit the plaintiff, Boyd Ash, to testify as to statements made to him by the defendant Criss B. Ash in the presence of Etta Ash under the so-called dead man's statute, section 25-1202, R. R. S. 1943; and (4) in holding that any agreement or promise giving rise to a constructive trust or estoppel must have been made by Etta Ash alone, and that any statements, representations, or promises made by Criss B. Ash out of the presence of Etta Ash could not be considered as raising a constructive trust or estoppel against either Etta or Criss B. Ash.

At the time of trial death had stilled the voice of Etta Ash and the law had barred those of her children who were plaintiffs, the spouses of those residing in Nebraska, and the son-in-law Melvin Ellingson who had succeeded to the rights of his wife from speaking.

The evidence with respect to what was said, agreed to, or done, to induce the plaintiffs to execute the documents transferring the estate of Alonzo B. Ash to Etta Ash, his widow, was very brief.

As to the meeting at the farm home near Broken Bow on December 30, 1937, William C. Schaper, the attorney, was called by the plaintiffs. He was not questioned about what was said at the meeting. He identified some of the exhibits and stated he was asked to prepare the papers by T. T. Varney, president of the Broken Bow State Bank. He said at that time he supposed he acted as attorney for the whole family. He was sure he had

not been consulted by Criss B. Ash previously and didn't think he had been consulted by Etta Ash before. Nothing he said or was asked about tended to prove or disprove any oral agreement or promise that might have induced the execution of the deeds or assignments.

Allen Light, the husband of the plaintiff Blanche I. Light, was the only other witness to give evidence concerning this meeting. He was permitted to testify because he and his wife were residents of Colorado. This was done under the rule announced in Kiser v. Sullivan, 106 Neb. 454, 184 N. W. 93, holding such a spouse has no direct interest in the litigation. He testified that at this meeting on December 30, 1937, Schaper, the attorney, at the request of the banker Varney, arose to explain what had to be done to allow Etta Ash to go ahead. He read the paper they were asked to sign which the witness remembered as one document, and asked if others desired to read it. He said if they signed it would give Etta Ash the right to all the property and the rights of all the children. They couldn't then touch a thing as long as she lived. Etta Ash asked them to sign it and said that her hands were tied and she couldn't do anything. She then said that if they would only sign it she would take care of things as long as she lived and would see that they each got an equal share when she was through with it. Something was said about what would happen if Boyd refused to sign with them. The witness said he asked the question concerning this. Fern Ellingson asked what would happen if her mother married again, and the witness' wife Blanch I. Light, said to her, "Fern, can't you trust your mother?" The banker then recommended the mother's honesty and the mother again stated that if they would sign the paper she would take care of the property as long as she lived, increase it, try to double its value, pay the taxes, not allow a mortgage on the land, and would leave each of her children an equal share when she was through with it.

On cross-examination the witness failed to remember

several things that happened at that meeting, many of which he naturally might forget. There were things of importance however that it might be supposed he would have remembered. He stated he and his wife signed one paper only though his signature appears on both the deed and the assignment. He says he was never in Schaper's office and knew of no letter signed there. When asked to identify his own signature on the quit-claim deed that he signed with the others under his wife's signature, he testified: "Q Now, did you see your wife, Blanche I. Light, sign that deed that night, or that afternoon? My question is, did you see her sign this deed? A Is this a deed? Q Yes, sir. A All I can remember of is signing one paper, and all I can remember her signing is one paper. Now, if it's a deed, - I can't read, - but there was one paper we signed, and that's all I remember. Q Is that your signature that appears as the second signature on that Exhibit 10? A Can I get to more light? Well, I don't wish to answer that question, if possible, on account of I was asked not to. Q Okay. A But my lawyer — I done my best to prove something, but they don't want me to use this in this court, so I won't answer. That's one thing I can't answer. My name is on there; and if that isn't good enough — I ain't going to say that I signed it. Q Did you sign it? A I ain't going to say that I did, no."

The conversation in Idaho when the papers were signed by Boyd and his wife was testified to by Amber Ash, his wife, they being residents of Idaho. Her evidence was that the conversations took place in the kitchen of their home on the ranch near Fairfield, Idaho; and that they took place between her husband, Boyd, Criss B. Ash, and Etta Ash, who nodded her head and added a word here and there. The substance of the conversation as repeated by her was that Criss told her husband Boyd that the papers would have to be signed since Boyd's mother, Etta Ash, couldn't conduct business otherwise; and that she would take perfectly good care

of all her property and when she was through with it, it would be equally divided among her four children. Something was said about attorney's fees and that it would make it easier for the mother if the papers were signed. The mother said at that time that she didn't know what she would do if the papers were not signed. She was crying at different times during the conversation.

The foregoing was the only evidence received concerning anything said or done in the presence of Etta Ash on the trip to Idaho tending to show an agreement on her part to convey or devise any of the property to Boyd at her death. It is true that in certain cases the promise need not be express in order to raise a constructive trust and that silent acquiescence on the part of the grantee may be sufficient where one has knowledge of the grantor's intention and understanding of the transaction. Box v. Box, *supra*. This evidence therefore was admissible as tending to show an assent on the part of Etta Ash to the agreement outlined by Criss B. Ash in her presence.

The plaintiffs attempted to show by Boyd Ash a conversation between him and his brother Criss in the presence of his mother. It was apparently the same conversation as related by his wife. It took place at the same place with the same persons present. It was excluded by the trial court which ruled that the witness could not testify as to the conversation because of the so-called dead man's statute, section 25-1202, R. R. S. 1943, Etta Ash being then present. Thereupon, an offer of proof was made. It is evident from the offer that the conversation was the same to which his wife had already testified. Under the circumstances it would have been but corroborative. In view of our decision the only relevance or materiality of the offered testimony would be on the theory that Etta Ash sat mute when she should have spoken. Amber Ash had already testified that Etta Ash cried, nodded her head, and said

she did not know what she would do if Boyd would not sign the papers. In Pearson v. Bertelson, 244 Minn. 224, 69 N. W. 2d 621, the Supreme Court of Minnesota, with respect to the dead man's statute of that state, quoted and approved its former decision in these words: "In the Pomerenke case we said, (228 Minn. 263, 36 N. W. [2d] 708):

"'* * * The all-inclusive coverage of this language is not to be evaded by dissecting a *conversation with* a decedent so as to allow testimony of what participants other than the decedent said and then to supply the import of decedent's contribution by a process of negation. A *conversation with* a decedent is not a one-sided affair in which only what the decedent said is to be considered.'"

We think the trial court did not commit error when this corroborative testimony was excluded.

There was testimony by Boyd that out of the presence of Etta Ash there were conversations between him and his brother Criss on a hunting trip in which Criss and his wife Frieda Ash urged him to sign the papers. The inducements held out by Criss as shown by this testimony were different and more attractive than those previously mentioned by Criss in his mother's presence. According to Boyd, Criss told him if the papers were signed each of the boys would get a farm and the daughters each an equivalent amount of money. These were admitted for the time being over objections that the testimony was irrelevant and immaterial, but the court's statement in dismissing the petition makes it clear it did not consider them. Plaintiffs complain that Criss and his mother were conspirators and that these statements should have been considered as binding upon the mother but, in any event, as estopping Criss. The position of the plaintiffs is without merit. There is no pleading in the petition except by conclusions of law of a conspiracy or estoppel. Neither is a separate cause of action stated against Criss. He was made a party

because when action was brought he held title and it was asserted he had knowledge of his mother's fraud in which it was alleged he participated, had notice of, and by which he was estopped. There is no showing that Criss said or did anything when the papers were executed at the home in Nebraska. In Idaho he only urged making the conveyance to his mother. Any agreement with Criss to be binding on him as a separate agreement would not create a resulting or constructive trust but would be an attempt to create an express one, as he received nothing by the plaintiffs' conveyance. The express trust would under such circumstances be void as not in writing under the statute of frauds. Halsted v. Halsted, 169 Neb. 325, 99 N. W. 2d 384.

As we view the evidence the question before us is whether there is sufficient evidence to show an agreement on the part of Etta Ash to reconvey or devise the property in question to the four children on her death. The plaintiffs urge that the rule that if a defendant in an action in equity moves at the close of the evidence of the plaintiff for a dismissal of the action for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it. Armbruster v. Stanton-Pilger Drainage Dist., 165 Neb. 459, 86 N. W. 2d 56. We do not feel that this rule abrogates or dispenses with the rule in this class of cases that the burden of proof is upon the one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. Musil v. Beranek, *supra*.

The oral statements of the witness Light as to the meeting at the home in Nebraska on December 30, 1937, and of Amber Ash in Idaho, were made more than 20 years after the conveyances. The testimony of Light, though he does recite the agreement, is not very clear, satisfying, or convincing. His cross-examination, a portion of which is set out heretofore, is not conducive to establish credence in what he says. He was the husband

of a party and, though qualified to testify, his story is subject to scrutiny because of that fact. The documents in question were drawn by a lawyer. They contained nothing to show the conveyances were not absolute. The letter to Boyd, signed by all the next day, was drawn by the lawyer thereafter and no such agreement was recited therein. The plaintiffs point to the fact that the letter did say that execution of the papers was the proper thing to do "so that mother will have all of the estate to do with as she pleases as long as she lives." They contend it indicates she was not to have the property therefor after her death. It is not however indicative of the agreement described by Light that she was neither to deed nor to mortgage it. It says that she can do with it as she pleases. If the lawyer present at the conversation testified to by Light had heard and understood there was the agreement Light describes, it was his duty as a careful lawyer to fully describe it therein. The conveyance of a life estate could have been drawn without great effort and a lawyer would have seen the necessity of it. There is nothing to suggest that the lawyer was lacking either in ability or integrity. Boyd's letter to Schaper and Runyan, after receiving the letter signed by all the children, clearly shows he understood the papers to be an absolute conveyance. In their letter in reply Schaper and Runyan clearly point out they understood it as Boyd did. Boyd's last letter shows he still understood the conveyance to be absolute. Thereafter he executed conveyances that contained no new provisions and reserved nothing whatever. Indeed they seem from the exhibits to be those originally sent to him, both as to appearance of the exhibits from comparison with the prior documents, and the dates contained therein.

After these letters and after the explanation of Schaper and Runyan, the plain import and effect of these instruments is sought to be altered in material and important aspects after more than 20 years by oral testi-

mony of one witness to each transaction, in each instance a spouse of a party, concerning conversations one of which was participated in by the grantee herself and the other by brief conversations of the brothers before their mother who is now deceased, at which time she only cried, nodded, and said she did not know what she would do if Boyd and Amber Ash did not sign. There is no showing of other circumstances or evidence that might substantiate the statements, either by word or deed.

The plaintiffs contend that, as stated in Restatement, Trusts, § 44, p. 137, in many instances a confidential relation exists not only between attorney and client, trustee and beneficiary, guardian and ward, and similar relationships, but also where because of family relationships the transferor is in fact accustomed to be guided by the judgment of the transferee or is justified in placing confidence and believes that the transferee will act in the interest of the transferor. In this case however, the children of Etta Ash were not shown to have been particularly close to her. They had lived for some time apart from her, were not home and did not see her often, and there was no showing that they were in the habit of depending on her judgment or looking to her for guidance in their business matters. Boyd quite clearly did not show that he relied on her or was under her influence.

A conveyance by children to their recently widowed mother under such circumstances would more likely be presumed a gift than a conveyance procured because of any fiduciary relationship raising a constructive trust.

It is because of the necessity of giving stability to written muniments of title that require courts of equity and good conscience to establish and decree constructive trusts only by clear, convincing, and satisfactory evidence.

The trial court found the evidence was insufficient to establish such a trust and to warrant a judgment in

favor of the plaintiffs, and with its ruling we are in accord.

The judgment is therefore affirmed.

AFFIRMED.

THURMAN F. WENZEL ET AL., APPELLANTS, V. OLIVER R. WENZEL ET AL., APPELLEES.
116 N. W. 2d 788

Filed June 22, 1962. No. 35180.

1. **Estoppel.** The doctrine of estoppel is applicable to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit.
2. **Partition: Wills.** Involuntary partition of an estate devised in equal shares to the testator's children cannot be decreed contrary to a provision in the will which forbids a division for a reasonable time fixed by the testator in definite terms; the condition not being a void restraint on alienation nor a limitation repugnant to the fee.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed as modified.

William L. Walker and Earl Ludlam, for appellants.

F. C. Radke and Wagener & Marx, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is a suit in equity brought by Thurman F. Wenzel and wife to quiet title to a quarter section of land specifically described in the petition as against a note and mortgage for $19,990 and to recover $16,000 paid on the purchase price of the land. The second cause of action raises the issue of the amount owing for pasture rent by the plaintiffs under a written lease. The third cause of action raises the question as to whether or not plaintiffs are entitled to make conditional payments to the

clerk of the district court on the $19,990 mortgage to avoid a default in payments thereon when the payments are due the executor of the estate of Fred C. Wenzel, deceased. The fourth cause of action is for the partition of the lands in the estate of Fred C. Wenzel, deceased. The trial court found generally against the plaintiffs and for the defendants on all causes of action, and the plaintiffs have appealed. We shall deal with each cause of action in the order above stated.

Fred C. Wenzel died on April 4, 1960, owning 5 tracts of land designated in the record as follows: The Home Place containing 160 acres, the North Place containing 160 acres, the Hay Shed Place containing 160 acres, the Berlett Place containing 145 acres, and the Cass County Eighty, containing 80 acres. Fred C. Wenzel died testate, having executed a will on September 2, 1958. His wife predeceased him, she having died on April 26, 1958.

On February 25, 1960, Fred C. Wenzel entered into a written contract to sell the Home Place to his son, Thurman F. Wenzel, the principal plaintiff herein, for the sum of $36,000, payable as follows: $10 in cash and $16,000 by a mortgage in that amount to be placed on the land by Fred C. Wenzel which plaintiffs were to assume. Upon the payment of the $16,000 mortgage, the deed which was placed in escrow was to be delivered to plaintiffs who at the same time were to execute and deliver a note and mortgage for $19,990 to Fred C. Wenzel. Because of the illness of Fred C. Wenzel, the parties on February 29, 1960, orally amended the contract of sale to provide for the immediate delivery of the deed, the obtaining of a first mortgage by plaintiffs to make the $16,000 payment, and the giving of a second mortgage to Fred C. Wenzel in the amount of $19,990.

Before the application for the first mortgage was approved, Fred C. Wenzel died. His son, Oliver R. Wenzel, was appointed special administrator and then executor of his father's estate. On April 12, 1960, following the death of Fred C. Wenzel on April 4, 1960, a copy of the

will of Fred C. Wenzel and a copy of the notice of probate were mailed to all the heirs of Fred C. Wenzel, including the plaintiffs, which plaintiffs admit they received. On April 22, 1960, plaintiffs notified the heirs, the special administrator, and the latter's attorney, that they were ready, willing, and able to complete the real estate transaction, and desired to do so. On April 26, 1960, the transaction was closed. The first mortgage was executed and delivered to the mortgagee, $16,000 was paid to the special administrator by plaintiffs, the deed was delivered by the escrow agent, and the note and second mortgage for $19,990 were likewise delivered to the special administrator.

The will of Fred C. Wenzel was admitted to probate on May 19, 1960, and Oliver R. Wenzel was at that time appointed executor by the county court. On June 8, 1961, plaintiffs filed their amended petition alleging that under the fifth paragraph of the will of Fred C. Wenzel the debt of $36,000, other than the $10 cash payment, was forgiven and that plaintiffs were entitled to receive back the $16,000 paid to the special administrator and to have the $19,990 note and second mortgage cancelled and held for naught, and that title to said real estate should be quieted in the plaintiffs.

The fifth paragraph of the will of Fred C. Wenzel provided: "If at my decease any of my children shall be indebted to me such debts shall not be an asset of my estate and shall be forgiven." The primary question raised as to the first cause of action is whether or not the cited provision of the will had the effect of forgiving the purchase price of the farm except for the cash downpayment of $10, and whether or not plaintiffs are estopped from asserting the fifth paragraph of the will as the basis for recovering back the $16,000 and securing the cancellation of the $19,990 note and mortgage.

The defendants first contend that the contract of sale between Fred C. Wenzel and Thurman F. Wenzel was conditional or contingent and therefore not a debt within

the meaning of the fifth paragraph of the will. We shall not discuss or pass upon that question for the reason that the case is determinable under the law of equitable estoppel.

The controlling facts are as follows: The contract of sale was entered into by Fred C. Wenzel and Thurman F. Wenzel on February 25, 1960. On February 29, 1960, the parties orally modified the contract by providing for the immediate delivery of the deed and the procuring of the $16,000 mortgage by the plaintiffs instead of by Fred C. Wenzel as first contemplated. Thurman F. Wenzel made application for a first mortgage loan on February 29, 1960, and the deed to the land was placed in the hands of an escrow agent on that date. Before the loan was approved, or obtained, Fred C. Wenzel died. A petition for the probate of the will of Fred C. Wenzel was filed on April 4, 1960. On April 12, 1960, copies of the will of Fred C. Wenzel and the notice of probate were mailed and received by plaintiffs. On April 22, 1960, plaintiffs notified the heirs of Fred C. Wenzel that they were ready, willing, and able to complete the real estate transaction, and advised them that plaintiffs would be prepared to close the transaction at the place stipulated in the contract of sale on April 26, 1960, at 2 p.m. The parties met at the designated place at the hour set. The plaintiffs paid $16,000 to the special administrator. The escrow agent delivered the deed to the plaintiffs and the note and mortgage for $19,990 to the special administrator. The transaction was completely closed.

There is evidence in the record that the market value of the land was $40,000. The contract price was $36,000. Thurman F. Wenzel served notice of his desire and ability to close the transaction. It was completed in accordance with his demand and the terms of the agreement made. It is quite evident that plaintiffs desired to complete the transaction in accordance with the contract of purchase and the oral modifications made there-

to. Plaintiffs had received a copy of the will before the transaction was closed. They knew and understood its contents. They elected to close the transaction in accordance with the contract of purchase, and made no claim that the purchase price other than the $10 cash payment was forgiven by the fifth paragraph of the will. The motivating factors which impelled plaintiffs to press for an immediate closing of the transaction are not shown by the record. We can only speculate that they may have considered the purchase price to have been less than the value of the land, or had doubts of the position they now present to this court. In any event, they elected to demand the delivery of the deed. They performed all covenants of the purchase contract. They voluntarily paid the $16,000 and executed and delivered the note and mortgage for $19,990.

After the contract of purchase was fully complied with in accordance with its terms, they assert that they are entitled to receive back the $16,000 and to have the note and mortgage cancelled. They are estopped from asserting the claim they are presently litigating.

In Securities Acceptance Corp. v. Brown, 171 Neb. 406, 106 N. W. 2d 456, this court stated: "The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit. And so also the acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, will create an estoppel."

In Cotner College v. Estate of Hester, 155 Neb. 279, 51 N. W. 2d 612, we quoted the following with approval: " 'Equitable estoppel or estoppel by misrepresentation is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct; and it arises where a person, by his acts, representations,

or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and the other person rightfully relies and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts.'"

Thurman F. Wenzel admits that he read the will of Fred C. Wenzel and understood its contents before he served notice on the heirs that he was ready, willing, and able to close the transaction in accordance with the terms of the real estate contract. It must be assumed, we think, that he preferred to take the land at the contract price rather than to risk litigation as to the interpretation of the will of Fred C. Wenzel. His insistance on closing the deal in accordance with the contract foreclosed any dispute as to the intention and effect of his father's will. He elected to take the benefits of the contract of purchase as orally modified. He further recognized the validity of the transaction by paying into court the first installment of principal and interest on the $19,990 second mortgage amounting to $1,500. Equity will not permit plaintiffs, after complying with the real estate contract and accepting its benefits with full knowledge of the import of the fifth paragraph of the father's will, to now assert it in order to escape the liability they assumed with their eyes open. Plaintiffs will not be permitted to obtain title to the land by asserting their rights under the contract and after obtaining the title to disavow the means employed to obtain it. Under such circumstances plaintiffs will not be permitted to retain the benefits and avoid the obligations they assumed in order to obtain them. The position that plaintiffs have assumed is unconscionable and inequitable, and is not deserving of the helping hand of a court of equity. The facts require a court of equity to apply the rules of equitable estoppel and deny relief.

The second cause of action involves the amount of pasture rent due under a written lease entered into on Feb-

ruary 25, 1960, between Fred C. Wenzel as lessor and Thurman F. Wenzel as lessee. The lands leased were the Berlett Place, the North Place, and the Hay Shed Place. The North Place was specifically excluded from the lease until March 1, 1961. The lease in question was for a term of 5 years beginning on March 1, 1960, and terminating on February 28, 1965. By the terms of the lease Thurman F. Wenzel agreed to pay Fred C. Wenzel "$6.00 per acre for about 75 acres of pasture," payable on September 1 of each year.

Thurman F. Wenzel testified that there are 20 acres of pasture on the Berlett and the Hay Shed Places and 55 acres on the North Place. Since the North Place was excepted from the first year of the lease, he tendered $120 as the rental for the 20 acres on the Berlett and Hay Shed Places. The tender was refused by the executor. The executor contends there were 22 acres fenced as pasture on the Berlett Place. He testified also that there were approximately 13 acres fenced on the Hay Shed Place and that there were additional acres available for pasture which included waterways and turn rows. The trial court found that approximately 60 acres of pasture were to be paid for as pasture at the rate of $6 per acre on the Berlett and Hay Shed Places. We do not think the evidence sustains this finding. After a consideration of all the evidence we conclude that there are 35 acres of pasture on the Berlett and Hay Shed Places within the meaning of the lease and that plaintiffs owe $210 as rent therefore for the year 1960. The judgment of the district court will be modified accordingly.

On the third cause of action the trial court found that the payments of interest and principal on the $19,990 note and mortgage should have been paid to the executor and not to the clerk of the district court and directed the clerk of the district court to pay any amounts so held to the executor. The disposition of this cause of action by the trial court is correct.

The fourth cause of action prays for the partition of the real estate in accordance with the respective shares of the heirs of Fred C. Wenzel. On this question the sixth and seventh paragraphs of the will of Fred C. Wenzel are pertinent. They are as follows:

"SIXTH, all the rest and residue of my estate I give, devise and bequeath to my nine children, sons and daughters, in equal shares, subject, however, to the following:

"At this time some of my land is subject to mortgage debt. It is my will therefore that my Executor, or his successor in office, keep my estate open and operate my farms until the said mortgage debt is paid if there remains not sufficient personal estate out of which to pay said mortgage debt; and my Executor, or his successor in office, is hereby fully empowered to operate generally all of my farm lands and to borrow money for such purpose if needed, from Lincoln Production Credit Association, and to pledge necessary security for such loans to the same extent that I could have done in my lifetime. The operation of my farm lands for the above stated purpose shall not continue for more than five years. The pay for the Executors special services in operating the farms as above intended shall be determined and authorized by order of the County Court. My executor shall make a complete annual accounting of the farming operations as above authorized.

"SEVENTH. I hereby appoint my son Oliver Wenzel to be the Executor of this, my last will and testament and to administer my estate, hereby revoking all former wills made by me. I hereby empower my Executor, or his successor in office, to sell and convey any or all of my real estate without order of any court when the mortgage debt thereon has been paid, or at the end of five years if not paid. This provision is made for the convenience in making final distribution of my estate to the beneficiaries thereof and such sale or sales may be at either public or private sale subject only to the

approval of the County Court by order entered."

Ordinarily, the right to partition property is one of right and not a matter of grace. The right to partition, however, may be restricted by the terms of a testator's will where the restriction is reasonable. In the instant case the testator by paragraphs six and seven of his will provided that his estate should be kept open and his lands remain in the possession of the executor until the mortgages on his lands were paid off or for a period of 5 years whichever occurred first. Mortgages on the lands of the deceased in the approximate amount of $33,377.43, exclusive of the two mortgages placed on the Home Place after testator's death, existed on testator's lands at the time of trial. The restrictions on the sale of the lands were within the province of the testator to make. The restrictions against the sale of the lands were reasonable and lawful. The result is controlled by Peterson v. Damoude, 98 Neb. 370, 152 N. W. 786, 14 A. L. R. 1238, wherein it is said: "It is evident from the language of the will that it was the purpose of the testator to postpone a division of the estate until her death. The general rule is that an adult tenant in common may demand partition as a matter of right * * *; and the fact that he is a remainderman and that the particular estate has not expired is not a valid objection * * *; but equity will not award partition at the suit of one in violation of his own agreement or in violation of a condition or restriction imposed upon the estate by one through whom he claims * * *; nor is such a condition or restriction in the instrument conveying the estate invalid as repugnant to the estate granted, or as against public policy * * *. We regard the language of the will fixing the time at which the estate shall be divided as an express condition against partition prior to that time. No partition can be had, therefore, until the particular estate of Hanorah Dee is extinguished." The trial court properly denied partition in the instant case as being prematurely brought.

The judgment of the trial court is in all respects correct except as to the modification of the amount adjudged to be due under the second cause of action.

AFFIRMED AS MODIFIED.

SAMUEL H. HANSEN ET AL., APPELLEES, V. THE COMMONWEALTH COMPANY, A CORPORATION, APPELLANT.
115 N. W. 2d 895

Filed June 22, 1962. No. 35183.

1. **Money Lenders: Usury.** The design of the Installment Loan Act is to license and control the business of making installment loans and to restrict the enforcement or collection of illegal loans once they have been made.
2. **Usury.** The burden of proving usury in an action on a promissory note rests upon the party charging it unless usury is apparent on the face of the note.
3. **Appeal and Error.** This being an action in equity it became the duty of this court to retry the issue or issues of fact in the finding or findings of fact complained of upon the evidence contained in the bill of exceptions, and upon trial de novo of such questions of fact to reach an independent conclusion as to what findings were required upon the pleadings and all of the evidence without reference to the conclusion reached in the district court.
4. **Usury.** Since usury is generally accompanied by device, subterfuge, scheme, and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form, and the right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument.
5. **Evidence.** Parol testimony is not admissible where it is offered for the purpose of proving by parol some other agreement as to the contractual terms and the method of payment other than that specified in the writing.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded with directions.

Ginsburg, Rosenberg & Ginsburg and Norman M. Krivosha, for appellant.

E. D. Warnsholz, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is an action in equity brought by Samuel H. Hansen and Emma M. Hansen, plaintiffs, against The Commonwealth Company, a corporation, defendant, in the district court for Lancaster County, to declare a loan made by the defendant to the plaintiffs to be void and uncollectible.

The trial court found that the promissory note and extensions thereof did not set forth the true and complete agreement between the parties; that the true and complete agreement between the parties called for repayment of the loan in a final, unequal, and balloon installment to be paid from the proceeds of the sale of the real estate; that such a final, unequal, and balloon installment was prohibited on all loans calling for interest charges in excess of 9 percent per annum; that said loan was void and uncollectible under the provisions of section 8-432, R. R. S. 1943, and the defendant was prohibited from collecting or receiving any portion of the principal or interest; and that the promissory note and four extensions thereof, the chattel mortgage, the real estate mortgage, and the assignment of rents should be held to be void and cancelled, and defendant should refund to plaintiffs all payments made on said loan, together with interest at the rate of 6 percent per annum computed from the date of each installment payment. Judgment was rendered in the amount of $1,688. The promissory note and four extensions thereof, the chattel mortgage, the real estate mortgage, and the assignment of rents were held to be void and cancelled. The clerk of the district court was ordered to refund to plaintiffs the payments made by them in compliance with the previous order of the court entered October 12, 1960.

The defendant filed a motion for new trial which was

overruled. The defendant perfected appeal to this court.

The plaintiffs' amended petition alleged that The Commonwealth Company was a Nebraska corporation, licensed as an industrial loan and investment company under the provisions of sections 8-401 to 8-433, R. R S. 1943, as amended; that on November 15, 1957, plaintiffs and defendant entered into a contract under which defendant loaned plaintiffs $2,704.20; that said loan was evidenced by a promissory note; that the loan was extended by four subsequent notes executed on March 25, 1958, September 9, 1958, February 5, 1959, and December 31, 1959; and that the plaintiffs made and the defendant accepted certain payments set forth in the plaintiffs' amended petition. The plaintiffs further alleged that the original loan and its extensions were void and uncollectible because installment payments, consisting of unequal, final balloon payments, were extended over a period of more than 36 months in violation of section 8-429, R. S. Supp., 1959; and that at the time of the negotiation of the loan, November 15, 1957, the defendant verbally informed plaintiffs and plaintiffs verbally agreed that the principal and interest of said loan would be paid in monthly installments of $50 each, beginning December 15, 1957. Plaintiffs further alleged that the defendant should refund to the plaintiffs all payments made by them, and that the loan should be cancelled. Plaintiffs prayed that the loan be declared void and uncollectible and that plaintiffs recover judgment for payments made by them, together with interest and costs.

There was a second cause of action pleaded by the plaintiffs which has been abandoned on this appeal.

The defendant's answer to the plaintiffs' amended petition admitted defendant's legal capacity, the execution of the original note and the extensions thereof as alleged in the plaintiffs' amended petition; and denied each and every allegation contained in the said petition except as specifically admitted. The defendant alleged that the loan of November 15, 1957, was made

for a 1-year period, payable in quarterly installments; that the plaintiffs failed to make the installments called for in the loan agreement; that at the plaintiffs' insistence and request, the defendant granted the extensions thereof; that at the time of making the extensions the plaintiffs represented to the defendant that they would, during the period of such extension, pay off their loan, and informed the defendant that they were in the process of selling certain real estate they owned which sale would be made before the loan became due and the loan would be paid; that the plaintiffs failed to comply with their representations and requested further extensions, assuring the defendant that they would sell their real estate and pay off the loan; that each and every extension of the loan was made at the specific request of the plaintiffs; that at no time did the defendant have any intention that the loan should run beyond 1 year from the date of the making thereof; that at no time did the defendant intend or expect to make any extension of the original loan, but in each and every instance the plaintiffs failed to make payment within the time required by the note and requested additional extensions; that none of the extensions were made at the request of the defendant, nor prearranged or planned for by the defendant; and that during the period of the extensions the plaintiffs made payments on account of their indebtedness, stating that thereby they would cut down the total indebtedness due the defendant and which would have to be paid out of the proceeds of the sale of their property.

By cross-petition the defendant alleged the execution of the note, the chattel mortgage on the house trailer, and a real estate mortgage as security for the payment of the note; and that the note and mortgage indebtedness were delinquent and unpaid. It prayed for foreclosure of the mortgages for the satisfaction of the amount due the defendant.

The plaintiffs' reply generally repeated the allega-

tions of their amended petition, and admitted payments made by them and accepted by defendant were as set forth in defendant's answer. These payments will appear in the statement of the evidence. The prayer of the reply was for the same relief as contained in the plaintiffs' amended petition.

"The design of the Installment Loan Act is to license and control the business of making installment loans and to restrict the enforcement or collection of illegal loans once they have been made." Robb v. Central Credit Corp., 169 Neb. 505, 100 N. W. 2d 57.

The sections of the statutes involved in this appeal are as follows.

Section 8-418, R. S. Supp., 1961, provides: "Any industrial loan and investment company may contract and receive on any loan, charges including interest at graduated rates not exceeding eighteen percent per annum on that part of the unpaid principal balance on any loan not in excess of one thousand dollars; not exceeding twelve per cent per annum on that part of the unpaid principal balance on any loan in excess of one thousand dollars and not in excess of three thousand dollars; not exceeding nine per cent per annum on that part of the unpaid principal balance on any loan in excess of three thousand dollars; Provided, that such graduated rates shall be computed strictly as simple interest on the unpaid principal balance for the time actually outstanding."

Section 8-429, R. S. Supp., 1961, provides in part: "Every loan made under sections 8-418 to 8-433 shall be repayable within a period of thirty-six months or less in approximately equal or declining installments of principal and interest at approximately equal intervals."

Section 8-423, R. R. S. 1943, provides in part: "All charges based upon due performance of the loan contract and computed as provided in section 8-418 may be included in the amount of any installment scheduled to be repaid by the borrower; Provided, however, that

the borrower may prepay the loan, in whole or in part, at any time and in case of such prepayment, whether in cash, extension, renewal or otherwise, the full unearned portion of the precomputed charges shall be canceled in such an amount that the charges paid by the borrower will not exceed the rates contracted for applied to the unpaid principal balance for the time actually outstanding, except that the charges retained may be increased to the extent that delinquency charges are computed in accordance with the monthly percentage agreed rates, either on a prepaid loan or a loan paid at maturity or after maturity."

Section 8-432, R. R. S. 1943, provides in part: "If the industrial loan and investment company shall fail to comply with any of the provisions of sections 8-418 to 8-433, in the making or collection of any loan which is subject to said sections, the loan shall be void and the lender shall have no right to collect and receive any principal, interest or charges."

For convenience we will refer to the plaintiff Samuel H. Hansen as Hansen, to The Commonwealth Company as defendant, and the Hansens at times as plaintiffs or Hansens.

Sumner E. Copple, called as a witness for the plaintiffs, testified that he was the president of the defendant; that a loan was made to the Hansens on November 15, 1957; that this loan was extended on March 25, 1958, September 9, 1958, February 5, 1959, and December 31, 1959; and that Marvin Copple, the vice president of the defendant, negotiated this loan and the extensions of the loan.

This witness identified the original promissory note and the extensions thereof, as follows: The original note, loan No. 27971, signed by the Hansens on November 15, 1957, was for the amount of $2,704.20. The principal and interest were payable in three payments of $991 each, one each 4 months, the first payment due on March 15, 1958, and the final payment due November

15, 1958. This note was secured by a chattel mortgage on a 1955 Mercury house trailer, a mortgage on real estate, and an assignment of rents. The agreed rate of charges on the unpaid principal balance of this note until paid was 1½ percent per month on that part of the unpaid principal balance not in excess of $1,000, 1 percent per month on that part of the unpaid principal balance in excess of $1,000, and not in excess of $3,000, and three-fourths of 1 percent per month on that part of the unpaid principal balance in excess of $3,000. Said charges were to be computed strictly as simple interest on the unpaid principal balance for the time actually outstanding, a month being any period of 30 consecutive days, and the daily rate 1/30th of the monthly rate. Further provisions in the note are unnecessary to relate.

The first extension was loan No. 28975, dated March 25, 1958. The principal amount of the note was $2,666.52. The principal and interest were payable in three payments of $952 each, one each 3 months, the first payment due on June 25, 1958, and the final payment due on December 25, 1958. The same security as appears in the original note was given. This note was executed, delivered, and accepted, not in payment, but for the purpose of extending the time of payment of a certain note dated November 15, 1957, for $2,704.20 in favor of the defendant.

The second extension was loan No. 30324, dated September 9, 1958. The principal amount of the note was $2,539.90. The principal and interest were payable in two payments of $1,336 each, one each 3 months, the first payment due December 10, 1958, and the final payment due March 9, 1959. The same security as appears in the original note, and the same extension language appears on this note as appeared on the first extension note.

The third extension was loan No. 31345, dated February 5, 1959. The principal and actual amount of the loan was $2,640.68. The principal and interest were payable

in three payments of $972 each, one each 4 months, the first payment due June 5, 1959, and the final payment due February 5, 1960, with the same security and the same language with reference to the extension as was used in the preceding extension notes.

The fourth extension was loan No. 33737, dated December 31, 1959. The principal amount of this note and actual amount of the loan was $2,619.04. The principal and interest were payable in three payments of $958 each, one each 4 months, the first payment due April 30, 1960, and the final payment due December 31, 1960, with the same security as appears in the original note, and extension provisions the same as appears in the preceding extension notes.

Each of the notes was a separate transaction as indicated by the loan numbers thereon.

There was a real estate mortgage given as security for the loan, made to the defendant by the plaintiffs, dated November 15, 1957, on real estate owned by the plaintiffs in Spencer, Nebraska. There was also a chattel mortgage given by the plaintiffs to the defendant as security for the original loan on a used 1955 Mercury house trailer on November 15, 1957. This chattel mortgage was endorsed as a first lien on the certificate of title to the trailer on November 22, 1957. There was also an assignment of rents executed by the plaintiffs to the defendant.

Sumner E. Copple further testified that each time an extension note was made, the old balance due was carried forward on such note, and no further security was asked for by the defendant; that the last payment received from the Hansens on their indebtedness was on September 8, 1960; that no payments have been made since that time; and that after giving credit for the payment of September 8, 1960, the balance owing by the Hansens to the defendant was $2,587.25, plus accrued interest from September 8, 1960.

The payments made by the Hansens to the clerk of

the district court as per order of the court were as follows: October 25, 1960, $50; November 8, 1960, $50; December 14, 1960, $50; January 9, 1961, $50; February 9, 1961, $50; March 12, 1961, $50; and May 11, 1961, $50. It was stipulated that the above amounts were correct.

Marvin E. Copple testified that he personally negotiated the loan with the Hansens; that at the time the loan was made he had a discussion with the Hansens regarding the method of repayment before the loan was finally signed; that they talked about the amount of money they wanted to borrow; and that Hansen said he had a house he was selling which would be sold shortly, that it had been for sale prior to the time the loan was made, that when he sold the house he would pay the loan in full, and that he would have the loan paid off before the first payment became due, which was 4 months from the time of signing the original note. Hansen asked this witness if he could pay the loan off sooner than the 4 months, and was told that he would be charged interest for the number of days the money was borrowed, and that he was free to pay off the loan at any time he wanted to. Hansen wanted to know if he could pay off the loan if he sold the house in the next few weeks, and he was informed that he could do so. This witness further testified that Hansen said he wanted to pay the loan off, and that the house would definitely be sold before the first payment became due. This witness further testified that $50 was paid on December 2, 1957; $50 on January 2, 1958; $50 on February 3, 1958; and $50 on March 4, 1958. On March 28, 1958, the loan was extended. At that time a discussion was had about the extension of the loan, and this witness told Hansen that he wanted the loan paid off. Hansen said that he did not have the money to pay it, that the house had not been sold but was still for sale, and that as soon as it was sold the loan would be paid. Then Hansen asked if he could have the loan extended until the house was sold. On March 28, 1958, Hansen promised that he

would be able to pay the loan in full before the next payment became due. When the second extension was made, there was the same type of discussion as before. Hansen again said he wanted to pay the loan but was unable to do so. On February 5, 1959, the house had not been sold. Hansen said the house would be sold before the first payment on the extension note of February 5, 1959, became due. At the time of the fourth extension note, this witness had the same type of discussion with Hansen as on the previous occasions when the extensions were made. Each and every time the original note was extended, Hansen stated that he would be able to pay off the loan before any of the payments due thereon would have to be made.

Marvin E. Copple further testified that the payments made by Hansen on the November 15, 1957, loan as extended were as follows: April 7, 1958, $50; May 6, 1958, $50; June 9, 1958, $50; July 7, 1958, $50; August 4, 1958, $50; and September 2, 1958, $50. The loan was extended on September 9, 1958, then payments were made by Hansen as follows: October 6, 1958, $50; November 10, 1958, $50; December 8, 1958, $50; January 12, 1959, $50; March 10, 1959, $50; April 20, 1959, $50; May 18, 1959, $50; June 15, 1959, $50; July 27, 1959, $50; September 22, 1959, $50; October 19, 1959, $50; December 1, 1959, $50; January 19, 1960, $8.21; May 24, 1960, $80; June 25, 1960, $75; July 22, 1960, $75; August 24, 1960, $75; and September 8, 1960, $75.

This witness further testified that during the time the payments of $50 a month were being made there was a discussion with Hansen concerning these payments. Hansen was told that these payments were inadequate and were not being made in accordance with the contract, and that the defendant wanted the note paid off as per schedule of the loan and as it was set up, not at the rate of $50 a month. When Hansen was told this, he said he could not pay the loan off and that the only way he could pay off the loan would be when he sold his

house in Spencer. This witness further testified that at the time the plaintiffs signed the original note they were told that even if they did not sell the house, they would be expected to make payments in accordance with the terms of the note; and that if Hansen wanted to make prepayments, he could do so. The first payment made by Hansen was within 17 days after the loan was made. Each time this loan became delinquent or the extension notes became delinquent, Hansen was contacted and always requested an extension of the original note for the reason that he had not sold his house and said that when he did so he would pay the loan. The evidence is rather extensive on this point and need not be discussed further.

This witness further testified that at no time was there any agreement that this loan was to be paid off at the rate of $50 a month. At no time were the plaintiffs advised that they would be obligated to pay the loan in any manner other than that set forth in the written instrument which they signed. Every extension was made in reliance on Hansen's representations that he was negotiating the sale of the house and would have it sold within a reasonably short time. The defendant had no alternative other than to extend the loan or foreclose the mortgages given as security for the loan.

Louis Klasna testified that he was engaged in the real estate and insurance business at Spencer, Nebraska; that he was acquainted with the Hansen property and was engaged to negotiate a sale of this property; that Hansen called him on March 24, 1960, to list the property for sale at $2,100 and to put an ad in the paper, which he did; that before March 1960, he was not representing Hansen but was representing a prospective buyer; and that the deal with the prospective buyer fell through on October 1, 1959.

Samuel H. Hansen testified that on November 15, 1957, he negotiated a loan with the defendant, the amount of which was $2,704.20; that he talked to Marvin Copple

about signing the papers; that he needed the money for the purpose of purchasing a trailer house; that he was to give the abstract to his property in Spencer to be held as security; that he was to pay $50 a month until he sold the property; that Marvin Copple agreed to that arrangement; that when he sold his property he was going to pay the loan in full; and that Marvin Copple called him in a few times and tried to get him to sell the house.

On cross-examination this witness testified that when he talked to Marvin Copple he had some people who were interested in the house and to whom he was selling the house for $3,000, but the deal fell through; that he and his wife thought the house would be sold; that Marvin Copple told him that he would make out his loan for 1 year and whenever the house was sold the loan could be paid off; and that he told Marvin Copple that he was going to try again to sell the house to another party and this deal ran for quite a while and then fell through. He then told Klasna to list the property and see what he could do about selling it. Up to the time the deal fell through on October 1, 1959, Hansen thought he had the property sold to a Mr. Harris. Marvin Copple told Hansen to dispose of the property so that he could make a settlement, that the loan was delinquent, and that the defendant could not carry it any longer. Hansen said he would put the house up for sale at auction rather than have a foreclosure. At the time the loan was made, Hansen asked Marvin Copple if he had a right to make any prepayments at any time, and was told he could pay any amount at any time.

Mrs. Samuel H. Hansen testified that she was present when the loan was made; that Marvin Copple was told that $50 a month was the amount that they could pay as they were paying on a trailer, and Marvin Copple said that would be all right; and that Marvin Copple was told that when the house in Spencer was sold the loan would be paid in one lump sum. This witness further

testified that she did not read the note before it was signed, and that no one tried to stop her from reading it.

The defendant assigns as error that the trial court erred in admitting in evidence parol evidence to contradict and vary the terms of the written instrument in suit; in finding that the loan in question provided for payment by a final, unequal, and balloon installment in violation of section 8-429, R. S. Supp., 1961; in finding that the loan in question was void and uncollectible under the provisions of section 8-432, R. R. S. 1943; in failing to find that the defendant was entitled to a foreclosure of the chattel mortgage and the real estate mortgage held by the defendant; and in failing to grant defendant judgment as prayed for in its cross-petition.

The burden of proving usury in an action on a promissory note rests upon the party charging it unless usury is apparent on the face of the note. See Nitzel & Co. v. Nelson, 144 Neb. 662, 14 N. W. 2d 197.

This being an action in equity it became the duty of this court to retry the issue or issues of fact in the finding or findings of fact complained of upon the evidence contained in the bill of exceptions, and upon trial de novo of such questions of fact to reach an independent conclusion as to what findings were required upon the pleadings and all of the evidence without reference to the conclusion reached in the district court. § 25-1925, R. R. S. 1943.

The defendant objected to the introduction of parol testimony given by the plaintiffs relating to payments on the loan at $50 a month and payment of the remaining indebtedness on the loan when they sold their house in Spencer, Nebraska, for the reason that such oral testimony was an attempt to contradict and change the terms of a written instrument and the extension notes relating thereto, and that such evidence was incompetent. This objection was overruled and such evidence was admitted.

In Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N. W. 2d 19, this court said: "Since usury is generally accompanied by device, subterfuge, scheme, and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form, and the right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument."

Parol testimony is not admissible where it is offered for the purpose of proving by parol some other agreement as to the contractual terms and the method of payment other than that specified in the writing. See 55 Am. Jur., Usury, § 166, p. 439.

The following, while not similar in facts to the instant case, does apply here.

As stated in Blindman v. Industrial Loan & Thrift Corp., 197 Minn. 93, 266 N. W. 455, 104 A. L. R. 1253: "The usury claim now presented by the plaintiffs is that prior to the signing of the note there was an oral agreement between the plaintiffs and the defendant that the note should be paid in four monthly instalments, on the 18th day of January, February, March, and April, 1932. The note itself reserved no interest before maturity, and the legal rate of six per cent after maturity. Plaintiffs rely solely on this oral agreement that the note, in contradiction to its plain terms, was payable in monthly instalments instead of in four months from date. * * * The question is squarely presented whether, as found by the trial court, this oral agreement that the note should be paid on dates different from those stated therein can here be shown for the purpose of establishing usury. The evidence of this alleged oral promise or agreement not only contradicts the terms of the note itself, but it is in contradiction of the general rule that parol evidence cannot be shown for the purpose of varying the terms of a written contract made, covering the same subject, prior to the execution and delivery of the note. * * *

There are numerous cases holding that on the question of usury parol evidence may be received to vary the terms of a written contract for the purpose of showing that it is illegal. There is a minority of decisions to the contrary. * * * Few, if any, of the decisions apply the majority rule where the oral evidence varies and contradicts the express terms of the note or contract sued upon in other respects than in reference to the consideration. To allow the time of payment to be changed by parol evidence, while the contract is still executory, is a very different process from using similar proof to show conduct of the parties in performance of it, where it has been executed in whole or in part. The distinction is clearly noted in Koehler v. Dodge, 31 Neb. 328, 334, 47 N. W. 913, 914, 28 A. S. R. 518, * * *."

In Koehler v. Dodge, 31 Neb. 328, 47 N. W. 913, 28 Am. S. R. 518, it was said: "It appears from the tenth finding that at the time of the making of the four notes which were renewed by the notes in suit it was agreed between the defendants and the payee that the makers should pay interest thereon from their date at the rate of eighteen per cent, instead of ten per cent as expressed on their face. It is argued by counsel that the parol contemporaneous agreement to pay a usurious rate of interest did not taint the notes with usury. It is doubtless true that when a person borrows money and gives his note therefore, specifying a lawful rate of interest, a verbal promise of the borrower made at the time the indebtedness is incurred to pay an unlawful rate of interest for the use of the money would not of itself make the transaction usurious." Cases are cited.

In A-1 Finance Co., Inc. v. Nelson, 165 Neb. 296, 85 N. W. 2d 687, the lender was prevented from showing that the oral agreement was different from the written agreement for the reason that the oral agreement varied and contradicted the terms of the written agreement.

In Perry v. Gross, 155 Neb. 662, 53 N. W. 2d 73, it was said: "Also the parol evidence rule is not merely

one of evidence. It is one of substantive law as well. As a rule of substantive law it renders ineffective proof of an oral prior or contemporaneous agreement the effect of which would be to vary, alter, or contradict the terms of a written agreement." Cases are cited.

In the instant case there was no contention made by the plaintiffs in their pleadings that the defendant exacted and received interest in excess of that permitted by law. What the plaintiffs contended for, and what the trial court determined by its judgment, was that the payment of the loan was in unequal installments and included a balloon payment. There is no contention on the part of the plaintiffs in their pleadings that they in any respect paid or contracted to pay more than the legal rate of interest.

The parol evidence in the instant case was not offered for the purpose of showing a contract to pay or the actual payment of usury, but for the purpose of showing that the note was not to be paid in accordance with its terms. In the light of the foregoing authorities relating to the admissibility of parol evidence in usury cases, the trial court erroneously admitted parol evidence over objection to be introduced in this case.

With reference to any preponderance of the evidence on the part of the plaintiffs to prove their case, there is positive evidence on the part of the defendant that the loan was made for a term as set forth in the original note, with the understanding that the plaintiffs could repay when they sold their house. There is, opposing thereto, the evidence of the plaintiffs that they told the defendant that they could only pay $50 a month. Plaintiffs do not deny that they told the defendant that before the note became due they would have their house sold and would be able to pay the loan. It appears that this evidence is entirely consistent with the defendant's understanding that the first payment, which was due in 3 months, would actually be anticipated by the sale of the house prior to that date.

We conclude that the judgment of the trial court should be reversed and the cause remanded with instructions to grant the defendant foreclosure of its security as prayed for in its cross-petition, that the plaintiffs' cause of action should be dismissed with prejudice, and that the trial court should render judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. LOUIS WILSON, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. HOMER CHARLES SMITH, APPELLANT.

115 N. W. 2d 794

Filed June 22, 1962. Nos. 35217, 35218.

1. **Criminal Law.** In a criminal action the Supreme Court will not interfere with a verdict of guilty based on conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Robbery: Trial.** The testimony of a single witness which identifies a defendant as a participant in a robbery is sufficient to sustain a finding of guilt if the witness had a reasonable opportunity to observe the defendant.
3. **Criminal Law: Evidence.** Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded.

Appeals from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

W. D. O'Shaughnessy and Edward T. Hayes, for appellants.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

Separate informations were filed in the district court charging each of the defendants with robbery under section 28-414, R. R. S. 1943. Upon the motion of the county attorney, the cases were consolidated for trial pursuant to subsection (3) of section 29-2002, R. S. Supp., 1961. The jury returned separate verdicts of guilty against each defendant. The defendants filed separate motions for new trial which were overruled and each defendant has appealed from the judgment of the district court. The cases were docketed separately in this court but, by stipulation, they were consolidated for briefing and argument. For that reason they will be disposed of by one opinion.

The principal assignment of error relates to the sufficiency of the evidence to sustain the conviction of each defendant. There was evidence from which the jury could have found that a robbery occurred in front of the First & Last Chance Cafe, also known as Johnny's Blue Room, in Omaha, Nebraska, between 3 and 4 a.m., on June 24, 1961.

The defendant Smith was identified as being at the scene of the crime and pointing a gun at William Roundtree, the complaining witness, by the testimony of Janie Williamson, Nathaniel Johnson, and Roundtree. Janie Williamson testified that the defendant Smith was holding a pistol in his hand and when she stepped in front of the complaining witness, Smith said, "Don't get in the way or I will burn you," or "If you don't move I will burn you."

Nathaniel Johnson, also known as "Lightning," is the proprietor of the Seventh Ward Improvement Club which is located at 5211 South Twenty-eighth Street in Omaha, Nebraska, and just across the alley north of the First & Last Chance Cafe. Johnson testified that he saw the defendant Smith point a gun at Roundtree.

Roundtree testified that he stopped his automobile in front of the First & Last Chance Cafe; that as he got out

of his car, five men came out of the alley between the cafe and the club; that the defendant Smith, also known as "Peaches" and "Peachy," pointed a gun at him and said, "You better not do nothing or I will shoot"; and that while Smith pointed the gun at him, a second man removed a billfold and some money from his pockets and struck him.

This evidence is sufficient to sustain the conviction of the defendant Smith. There was evidence to the contrary but it merely presented a question of fact for the jury. It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. Pulliam v. State, 167 Neb. 614, 94 N. W. 2d 51. In a criminal action this court will not interfere with a verdict of guilty based upon conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.

The issue with respect to the defendant Louis Wilson is more difficult. The defendant Wilson is identified as having participated in the robbery only by the testimony of Roundtree. Roundtree testified that he recognized two of the men who came out of the alley. One of the men was the defendant Smith with whom Roundtree had some acquaintance. The other man was a stranger to Roundtree and Roundtree testified that he did not know the man's name. However, Roundtree positively identified a man sitting in the courtroom, "The guy right here with the jacket on," as the man who took the billfold and money from his pockets and who struck him. There is nothing specific in the record that relates this testimony directly to the defendant Wilson but it is apparent that those present at the trial understood that Roundtree was referring to the defendant Wilson when he described him as "The guy right here with the jacket on."

No other witness identified the defendant Wilson

as being present at the scene of the crime until after the robbery had taken place. Janie Williamson testified that she did not see the defendant Wilson at the scene of the crime. Nathaniel Johnson testified that the defendant Wilson was not there when the defendant Smith was pointing the gun at Roundtree and that the defendant Wilson came to the scene a little bit later. Johnson also testified that when he asked several men in an automobile to return Roundtree's billfold, a "little short guy in the back seat throwed" the billfold to the defendant Wilson and that Wilson handed the billfold to Johnson.

The testimony of a single witness which identifies a defendant as a participant in a robbery is sufficient to sustain a finding of guilt if the witness had a reasonable opportunity to observe the defendant. Small v. State, 165 Neb. 381, 85 N. W. 2d 712, 70 A. L. R. 2d 984; Wilshusen v. State, 149 Neb. 594, 31 N. W. 2d 544. The credibility of the witnesses was for the jury and the jury in this case had a right to believe Roundtree. Thus, the evidence is sufficient to sustain the conviction of the defendant Wilson although it is just barely sufficient.

The remaining assignments of error relate to an effort on the part of the defendants to introduce evidence relating to an indecent act that was supposed to have taken place in Roundtree's car some time before the robbery occurred. It is clear that this evidence did not in any manner tend to prove or disprove that a robbery occurred or who may have participated in the robbery. Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relevant to the issue is properly excluded. Scherer v. State, 168 Neb. 127, 95 N. W. 2d 329. The objections of the county attorney to this evidence were properly sustained and the assignment of error is without merit.

The judgment of the district court in each of the cases is affirmed.

AFFIRMED.

JERRY ERVING, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
MILTON HOWARD, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
116 N. W. 2d 7

Filed June 29, 1962. Nos. 34911, 34912.

1. **Criminal Law: Evidence.** As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution.
2. ———: ———. However, in crimes involving motive, criminal intent, or guilty knowledge, evidence of independent crimes wholly disconnected with the one charged may be received.
3. **Criminal Law: Witnesses.** When a defendant in a criminal case testifies in his own behalf he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination, and ordinarily he cannot avail himself of the objection that the evidence may incriminate him.
4. ———: ———. The cross-examination of a witness which relates to the issues and facts pertinent thereto may be pursued by counsel as a matter of right, but when the object of the cross-examination is to collaterally ascertain the accuracy or credibility of a witness, some latitude should be permitted. The scope of such latitude is ordinarily subject to the discretion of the trial court and, unless abused, its exercise is not reversible error.
5. **Criminal Law.** By section 29-102, R. R. S. 1943, the term "felony" signifies such an offense as may be punished with death or imprisonment in the penitentiary.
6. ———. A conviction by a court-martial is a felony within the Nebraska definition if the offense for which the conviction is had may be punished by imprisonment in a penitentiary.
7. **Appeal and Error.** Objection to the admission of evidence cannot be considered by this court for some reason not properly and timely raised at the trial.
8. ———. It is no part of the duty of this court to search a voluminous record for the purpose of ascertaining if there is error in it.
9. ———. The function of an assignment of error is to specifically point out the exact instance of the alleged error.
10. **Searches and Seizures.** All evidence obtained by searches and seizures in violation of the Fourth Amendment to the federal Constitution is, by virtue of the due process clause of the

Fourteenth Amendment, guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible in the courts of this state.

11. **Criminal Law.** To be available, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected.

12. **Appeal and Error.** In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged.

13. **Criminal Law: Evidence.** In a criminal case, the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written copies of statements and other documentary evidence for the inspection of defendant's counsel before trial. Error may be predicated only for an abuse of discretion.

Error to the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Schrempp & Lathrop and O'Sullivan & O'Sullivan, for plaintiffs in error.

Clarence A. H. Meyer, Attorney General, and Cecil S. Brubaker, for defendant in error.

Heard before SIMMONS, C. J., CARTER, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

SPENCER, J.

These are two criminal actions instituted in the district court for Douglas county by separate informations charging Jerry Erving and Milton Howard with murder in the first degree. The cases were consolidated for trial. The jury found the defendants guilty and fixed their punishment at life imprisonment. Both defendants appeal.

The record is voluminous and it will serve no useful purpose to attempt to summarize all the evidence. The defendants do not question its sufficiency to sustain the convictions. Suffice it to say that it was more than ample if believed by the jury to sustain a conviction.

We therefore will attempt only the briefest outline.

On December 27, 1959, Edward Ellis and Dorothy Elliott were found dead in an upstairs apartment they shared. Each had been shot twice in the head, once with a 38-caliber bullet and once with a 22-caliber bullet. Each had died of the gunshot wounds.

Edward Ellis, hereinafter referred to as Ellis, was to have been a witness against the defendant Milton Howard, hereinafter referred to as Howard, on a federal complaint which charged Howard with selling narcotics to Ellis. Preliminary hearing on that complaint was set for December 28, 1959.

Donald Williams, who confessed to being an accomplice in the killing, testified for the State that Howard told him on December 24, 1959, that it was worth $1,000 for Edward Ellis not to testify. Another witness, Rudolph Williams, testified he had been at the home of the defendant, Howard, on December 24, 1959, and while there heard Howard tell the defendant, Jerry Erving, hereinafter referred to as Erving, that Ellis had to go and it was worth $1,000.

Donald Williams testified he saw Erving's car at the Howard home on Christmas Day, and a little later Erving came to him and asked where Ellis lived and if he could arrange to get Ellis to come out or if not if he could get Erving up inside the house. Donald Williams said he might the next day. Later that day, Howard came over to Donald Williams' home and indicated his knowledge of Erving's conversation with Williams.

Donald Williams further testified that he called Erving the next evening, December 26, 1959, sometime after 11 o'clock, and the two of them went to the Elliott-Ellis apartment. Donald Williams took along a 38-caliber revolver he had earlier acquired from Howard. During the ride over, Erving gave Donald Williams one of his brown gloves to wear. Donald Williams was admitted to the house by Dorothy Elliott but he could not persuade Ellis to leave the house so he left, but as he did

so he fixed the lock on the front door so that it would not lock. Then he and Erving went back up the stairs to the Elliott-Ellis apartment, he picked a quarrel with Ellis, and pulled out his gun. Dorothy Elliott, who was sitting on the couch, grabbed his arm. The gun went off, and she slumped back on the couch. Donald Williams said he then ran out of the house but heard other shots behind him. He wasn't sure whether or not he shot Ellis.

Erving later picked Donald Williams up in his car and they drove to Carter Lake, about a mile away, where Donald Williams, at Erving's direction, threw both guns, his 38-caliber and a small caliber revolver given to him by Erving, into the lake. Williams also threw his brown glove out of the car window at Erving's direction.

When Erving left Donald Williams that night he told Williams he would be by the next day with some money for him. The next day Erving stopped at Donald Williams' home and gave him $150. Later that day Howard came to the Donald Williams' home with Rudolph Williams. Howard told Donald Williams he had paid Erving and gave him $250, saying that would make a total of $500, less the $100 Erving said that Williams owed to him.

After his arrest, Donald Williams took the police to Carter Lake where they found two brown gloves and where they later recovered a 38-caliber revolver and a 22-caliber revolver from the water at the spot where Donald Williams said he had thrown them. The guns were rusted and corroded, and both of them had spent shells in their chambers. The slugs found in the heads of the victims and in the sofa on which they were found were examined by experts. They appeared to have the same characteristics as the live bullets remaining in the guns; could have come from the spent shells in the guns; and could have been fired from guns having the same rifling characteristics as the guns found in the lake. The shells in the 22-caliber gun were of the same type as

some 22-caliber shells found in the glove compartment of the Erving car.

Howard's defense was a complete denial of implication in the shooting and an alibi. He denied ever mentioning it was worth $1,000 to get rid of Ellis. He did admit to giving Williams $250, but claimed it was for an unmounted diamond Williams sold to him on Christmas Eve. A court reporter testified on rebuttal that on an earlier occasion Howard had said he gave Williams the $250 for the purpose of enabling Williams and Ellis to leave town and to hide out in Chicago.

Erving's defense was also a denial and an alibi. He claimed he and Howard were in Council Bluffs at the time Donald Williams claimed the killing took place. There was no question the defendants had been in Council Bluffs earlier that evening. There was, however, some inconsistency in the time involved, which, if believed by the jury, was consistent with Donald Williams' testimony.

While the defendants do not question the sufficiency of the evidence, they do seriously urge nine separate assignments of error involving trial procedures and the admission of evidence. These will be considered in the order of assignment.

Defendants first contend that the court erred in permitting a witness for the State to testify that he had purchased narcotics from the defendants. This refers to the testimony by State's witness, Donald Williams, who had confessed to complicity in the murders and had implicated the two defendants. On direct examination, he had testified to his use of narcotics. On cross-examination he was questioned at considerable length about the use of narcotics as well as about his knowledge that the two murder victims were addicts. He was specifically asked on cross-examination if he had ever used narcotics with Edward Ellis, one of the victims. On redirect examination he was asked: "Q- Just explain where you would get these narcotics that you used

with Edward Ellis? * * * MR. O'SULLIVAN: (continuing:) Object to that as incompetent, irrelevant, immaterial, and not tending to prove or disprove any issue in the case; nothing in the direct examination to show whatever drugs he used. THE COURT: You may answer. A- We were supplied by either of the two defendants; they usually supplied any quantity."

As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. Fricke v. State, 112 Neb. 767, 201 N. W. 667. However, in crimes involving motive, criminal intent, or guilty knowledge, evidence of independent crimes wholly disconnected with the one charged may be received. Swogger v. State, 116 Neb. 563, 218 N. W. 416. See, also, Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632. Motive was an important element of proof. It involves an exception to the rule contended for by the defendants. Exhibit No. 18, about which the witness had been questioned, was a complaint charging defendant Howard with a narcotics violation in which Ellis appeared to be an informer. Further, in the light of the extensive cross-examination of the witness as to his involvement with narcotics and his knowledge from personal observation of the addiction of the murder victims, it was not error to show the involvement of the defendant Howard in the sale of narcotics to the murder victim who was to be a witness against him on a charge of such sale. The evidence elicited as to the source of supply of narcotics involved both of the defendants and served to strengthen the showing of motive with respect to Howard.

Defendants' second assignment of error is that the court should have sustained a motion for mistrial occasioned by the State asking the defendant Howard if he sold narcotics to one of the State's witnesses. Objection was made to the question and the objection was sustained. Request was then made of the court to admonish counsel and also that the court instruct the jury

to disregard the statement of the prosecutor. The court then asked the reporter to read back the question and again sustained the objection to the question. Counsel for defendants then moved for a mistrial, which motion was overruled. While the defendant Howard might not be required to answer the question because it might incriminate him, the question itself was not prejudicially erroneous. The court did sustain the objection. As set out above, the showing of motive is an exception to the rule contended for by the defendants. The question did not inject any new crime or element into the case.

The third assignment of error contends that the court erred in permitting the deputy county attorney to cross-examine the defendant Howard concerning his alleged source of supply of narcotics. Howard, in his direct examination, testified that Cox, a federal narcotics agent, in an interview at the Douglas county jail, had suggested the story he should tell about his connection with the murder. He testified that he refused to do so, contending he had no connection with the murder. Howard also testified on direct examination that Cox wanted him to gather information on dope activity. The questions asked on cross-examination concerned his conversation with Cox, which subject was opened up by the direct examination.

In Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632, we said: "When a defendant in a criminal case testifies in his own behalf he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination, and ordinarily he cannot avail himself of the objection that the evidence may incriminate him." In the same case we also said: "The cross-examination of a witness which relates to the issues and facts pertinent thereto may be pursued by counsel as a matter of right, but when the object of the cross-examination is to collaterally ascertain the accuracy or credibility of

a witness, some latitude should be permitted. The scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error." There was no abuse of discretion in this instance. Actually, the record indicates that the trial judge could have been more lenient than he was and still have been within the rule.

In connection with these assignments of error, the court, by instruction No. 16, about which defendants make no complaint, restricted the evidence complained of to the proof of motive. The instruction given is as follows: "You are instructed that evidence adduced that the defendant Milton Howard committed another crime, or crimes, for which he had not been apprehended or tried, was admitted for the sole and only purpose of tending to prove that the defendant Howard had a motive and the intent to commit the alleged crime for which he is here tried, and such evidence shall be considered by the jury for that purpose only."

Assignments of error Nos. 4, 5, and 6 relate to the question as to whether desertion from the army is a felony under Nebraska law for the purpose of impeachment under section 25-1214, R. R. S. 1943. Defendant Erving was asked on cross-examination if he had ever been convicted of a felony. He replied, "Once." The State then introduced exhibits Nos. 82 and 83. Exhibit No. 82 is a certified copy of a court-martial record showing the conviction of Erving for desertion from the army. Exhibit No. 83 is a certified copy of a conviction of Erving in the United States District Court for the District of Nebraska for violation of the narcotics act, for which sentence was imprisonment for 2 years. It is the defendants' contention that desertion from the army is not a felony for the purpose of impeachment of a witness because it is not punishable under the civil law. They contend that when Erving testified he had been convicted once, he testified truthfully, and the admission of the record of the conviction was prejudicial error. We held in

Vanderpool v. State, 115 Neb. 94, 211 N. W. 605: "Under section 8848, Comp. St. 1922 (now section 25-1214, R. R. S. 1943), providing that a witness may be interrogated as to his previous conviction for a felony, but that no other proof is competent except the record thereof, a defendant in a criminal prosecution becoming a witness in his own behalf may be asked on cross-examination whether he has previously been convicted of a felony, and if he answers in the affirmative further examination along that line should cease. If he answers in the negative, he may be impeached only by the record of his conviction."

The cases cited by the defendants do make the distinction that desertion from the army is not a felony because it is not punishable under the civil law. Historically, by some early English statutes, desertion was made a felony punishable in the civil courts, but those statutes fell into disuse after the Revolution of 1688 when Parliament, by the Mutiny Acts, for the first time authorized mutiny and desertion to be punished by a court-martial in time of peace. In this country, desertion has been made a military offense by the statutes of the United States and, at least since the Declaration of Independence, has been considered exclusively a military crime punishable by court-martial and not by civil tribunals. However, there are cases which hold that conviction by a court-martial of desertion is admissible as affecting the credibility of a witness. See, Jordan v. State, 141 Ark. 504, 217 S. W. 788; Nelson v. State, 35 Ala. App. 179, 44 So. 2d 802.

In Nebraska, the term "felony" is defined by section 29-102, R. R. S. 1943: "The term 'felony' signifies such an offense as may be punished with death or imprisonment in the penitentiary."

Title 10, U. S. C. A., § 885, p. 316, provides in part: "(c) Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a

court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment, other than death, as a court-martial may direct."

The defendant Erving was sentenced to confinement in the United States Disciplinary Barracks, Fort Missoula, Montana, for 2 years at hard labor, or elsewhere as the Secretary of War may designate.

Title 18, U. S. C. A., § 1, p. 5, provides in part: "Notwithstanding any Act of Congress to the contrary: (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony." Title 18, U. S. C. A., § 4083, p. 485, provides in part: "Persons convicted of offenses against the United States or by courts-martial and sentenced to terms of imprisonment of more than one year may be confined in any United States penitentiary."

The purpose of section 25-1214, R. R. S. 1943, is to bring before a jury elements which may serve to test the credibility of a witness. When the defendants testified in their own defense, they thereby assumed the position of ordinary witnesses and were subject to be discredited on cross-examination. The law presumes that the character and reputation of a witness is good and that he will tell the truth when he takes an oath to do so. For this reason, it has always been considered proper in cross-examination to interrogate the witness as to matters which clearly tend to disprove the legal assumption with which he is clothed. Such interrogation is admitted solely to test his credibility and can only be considered by the jury for that purpose.

To protect a witness, we have narrowed the scope of the cross-examination by statute, and if he admits his previous conviction, the examination can go no further. If he has been convicted more than once, that certainly also is pertinent on the question of credibility, and we have so held. Sulley v. State, 119 Neb. 783, 230 N. W. 846.

We concede that there is a division of authority in

other jurisdictions as to whether a military conviction of desertion can be used to impeach a witness. It is a case of first impression in Nebraska. Our statute specifically defines a felony as any offense which may be punishable by imprisonment in the penitentiary. We should test the offense by that definition. Desertion may be so punished. In fact, defendant Erving was sentenced to imprisonment for 2 years at hard labor. It is our conclusion that a conviction by a court-martial is a conviction for a felony within the Nebraska definition if the offense for which the conviction is had may be punished by imprisonment in a penitentiary.

The sixth assignment of error urges that the court erred in admitting the court-martial record without foundation. The bill of exceptions does not indicate that such specific objection was made. Exhibit No. 82 is the certificate of the acting chief of the litigation division of the Judge Advocate General's Department, and it is authenticated with the signature of the Secretary of the Army, by his administrative assistant. There is also attached the seal of the Department of the Army. The exhibit meets the test for the production of documentary evidence.

The seventh assignment of error is that the court erred in allowing the State to show that the defendant refused to answer questions put to him by the county attorney soon after his arrest, and that he wanted to see his attorney. The assignment does not specify to which defendant it refers. We assume the reference is to the interrogation of defendant Erving which is entered in the proposed amendments to the bill of exceptions by proposed amendment No. 7 which was accepted by the court. The testimony includes answers voluntarily given by the defendant to questions asked by the deputy county attorney until the defendant noticed the court reporter, when the following occurred: "Q. 'Anybody else?' A. 'What is he writing there?' (indicating) Q. 'All the questions I ask and all of your answers.' A. 'You

people are trying to mess me up. I haven't got nothing more to say. I want to see a lawyer.' Q. 'Let me take you back yesterday from noon on. Did you work yesterday afternoon?' A. 'I want to see a lawyer.' Q. 'Were you home at five o'clock last night?' MR. O'LEARY: Let the record show he refused to answer the question. Q. 'Were you home at six last night?' A. 'I would like to see a lawyer.' Q. 'Were you home at seven last night?' A. (No answer) Q. 'Can your wife verify you were home from ten last night until 6:30 this morning?' A. 'I still want to see a lawyer.' Q. 'Where were you Christmas Day?' A. (no answer) Q. 'Where were you the day before Christmas?' A. (no answer) MR O'LEARY: Let the record show he refuses to answer any further questions." The questions here asked covered answers which tended to impeach his alibi which he had given voluntarily to the questions asked until he observed the court reporter. While it would have been better practice to have left out this portion of the statement in the trial, we do not believe that its admission under the facts herein was erroneous. In any event, the record does not disclose that any objection was made to the reading of this testimony at the time it was offered. Objection to the admission of evidence cannot be considered by this court for some reason not properly and timely raised at the trial. Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868. When the testimony was included in the bill of exceptions by amendment, if the proposal did not include all of the record, the defendants should have pointed out the omission.

The eighth assignment of error is that the court erred in admitting into evidence articles taken from the home of the defendant without a search warrant. Here again, there is no specification as to the defendant involved nor are the specific articles identified in the assignment. The bill of exceptions herein consists of 13 volumes, and specifications of error should be specific. It is no part of the duty of this court to search a voluminous record

for the purpose of ascertaining if there is error in it. Minick v. Huff, 41 Neb. 516, 59 N. W. 795. The function of an assignment of error is to specifically point out the exact instance of the alleged error.

From the argument, we believe that the defendants are referring to certain 22-caliber bullets found in a drawer in the Erving home. When the police came to the Erving home, Mrs. Erving asked them if they had a search warrant, and she was told that they did not, but she made no objection to their entry or to their search. The manner of the search and the action of the officers, as detailed in Mrs. Erving's testimony, if true, would be such as to offend a sense of justice and could not be condoned. If the evidence obtained resulted in a conviction, and proper objections were made, the conviction would have to be reversed.

Subsequent to the trial of this case, the United States Supreme Court decided Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, which announced the rule that, as set out in the latter citation: "All evidence obtained by searches and seizures in violation of the Fourth Amendment of the Federal Constitution is, by virtue of the due process clause of the Fourteenth Amendment guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible in a state court." It is this rule that defendants urge upon us. This rule is now the law of the land and overruled those decisions which permitted the use of unconstitutionally-seized evidence in a trial in the state courts. However, to be available, as a footnote in Mapp v. Ohio, *supra*, observes, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected.

In Pulliam v. State, 167 Neb. 614, 94 N. W. 2d 51, we held: "In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate ref-

erence be made to the specific evidence against which objection is urged."

The receipt in evidence of the 22-caliber bullets found at the Erving home was a circumstance which might tend to connect defendant Erving with one of the murder weapons. However, shells of exactly the same type were found in Erving's car, so that he was connected with the shells and the weapon involved without this testimony, which at best could only be cumulative. The questioned evidence appears to be exhibit No. 39, which consisted of shells identified by one of the officers who searched the home as being shells found in a drawer in the Erving bedroom. In answer to a question on his direct examination, the officer said he did not have a search warrant. No objection was made to his testimony. On cross-examination, he was not questioned about his search. Exhibit No. 39 was offered in evidence later during the testimony of another officer who was present when the shells were found. The following is the record of the offer: "MR. DENENBERG: At this time the State offers in evidence, Exhibit No. 39. MR. O'SULLIVAN: Objected to as incompetent, immaterial, irrelevant, no proper or sufficient foundation laid. THE COURT: It will be received."

During the testimony of the same officer, exhibit No. 37, which consisted of four 22-caliber long rifle shells taken from Erving's automobile, was offered in evidence. That offer is as follows: "MR. DENENBERG: I offer in evidence, Exhibit No. 37. MR. O'SULLIVAN: That is objected to as incompetent, immaterial, irrelevant, and no proper or sufficient foundation laid. THE COURT: It will be received."

As suggested, the shells in exhibit No. 37 are exactly the same type of shells as offered in exhibit No. 39. The exhibits were properly identified and foundation-wise were admissible. There can be no question that the objections as made were properly overruled. The objections did not in any manner point up the one now

being urged for the exclusion of exhibit No. 39.

The ninth and final assignment of error is as follows: "The court erred in refusing to permit the defendants to inspect statements given to the police and county attorney by the two principal witnesses for the state." This assignment refers to the motion of defendants to require the county attorney to furnish the counsel for defendants with a copy of all statements taken from the witnesses Donald Williams and Rudolph Williams, either by the county attorney or members of the Omaha police department. The stated purpose of the motion was to procure such statements for purposes of impeachment. Support for the motion was on information and belief that such statements were inconsistent with the testimony of the witnesses as given at the preliminary hearing.

Defendants rely on Jencks v. United States, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, which opened the files of F.B.I. agents touching events and activities to which they had testified at the trial. Defendants contend under the authority of the Jencks case it was a denial of due process not to sustain their motion for production of the statements. With this we cannot agree. It is not a requirement of due process under the Constitution. Actually, Congress, immediately after the Jencks case, by passage of Public Law 85-269, Eighty-fifth Congress (the Jencks Act, Title 18, U.S.C.A., § 3500), substantially curtailed the right of inspection announced in the Jencks case.

The question here presented is not an open one in this jurisdiction. We have held that in a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written copies of statements and other documentary evidence for the inspection of the defendant's counsel before trial. Error may be predicated only for an abuse of discretion. See, Cramer v. State,

145 Neb. 88, 15 N. W. 2d 323; Linder v. State, 156 Neb. 504, 56 N. W. 2d 734.

Both of the witnesses in question were subjected to extensive cross-examination, and both admitted that they at first denied any knowledge of the murders, but later told their stories. Impeachment by contradictory former statements was therefore accomplished by cross-examination in which the inconsistency was pointed out and admitted. The statements themselves, if any had been transcribed, would be cumulative. There is nothing in the record to indicate that any statements were signed, verified, or read and approved by the witnesses as being a correct record of the statements. In fact, Donald Williams specifically negatives any signing or approval of any statement. At best, any statements in the prosecutor's file were nothing more than memoranda or the work product of the county attorney's office.

In Dinsmore v. State, 61 Neb. 418, 85 N. W. 445, the opinion indicates that after making a confession, a witness was examined, but not under oath, by the county attorney, and that the examination was taken down in shorthand by another person. The statement, if transcribed, was never seen or read to the witness or signed by her. Counsel for the defendant at the trial demanded the production of the statement, which demand was refused. We said, at page 436: "This refusal it is urged is a denial of the right of defendant to a full and fair opportunity to cross-examine the witness concerning the facts in the case. We can not see that it was. If the statement was ever transcribed, a fact not positively sworn to by any one, it was the property of the county attorney. It was nothing more than a brief of the evidence prepared by the county attorney for his own convenience in trying the case, or preparing it for trial. We can not imagine any reason for compelling the county attorney to turn over to counsel for defendant his private memoranda. The defendant had no right

to it, and the court was right in refusing to compel a surrender of it." The trial court did not abuse its discretion in denying the motion of the defendants.

For the reasons given above, the assignments of error are without merit. There being no prejudicial error in the record, the judgment of the district court is affirmed.

AFFIRMED.

TONY A. ZAGER, APPELLEE, V. JANETTE JOHNSON, APPELLANT.
116 N. W. 2d 1

Filed June 29, 1962. No. 35197.

1. **Automobiles: Municipal Corporations.** By the terms of statute the maximum speed limit permitted at the intersection involved in this action was 25 miles an hour.
2. ———: ———. By the terms of statute in force at the time of the accident involved here, where two motor vehicles approached an intersection at approximately the same time and within the maximum limit of speed provided, the driver of the one to the left was required to yield the right-of-way to the one to the right.
3. ———: ———. By the terms of statute a driver of an automobile having the right-of-way at an intersection forfeits such right-of-way if he is driving in excess of the limit provided.
4. **Trial.** Where different minds may draw different conclusions from the evidence in regard to negligence, the question is one for submission to a jury.
5. **Negligence: Trial.** In a case where contributory negligence is asserted as a defense the evidence may not properly be held to be sufficient to sustain a judgment as a matter of law and defeat a recovery by the plaintiff unless it shows beyond reasonable dispute that plaintiff's negligence is more than slight as compared with the negligence of the defendant.
6. **Trial: Damages.** A jury should be fully and fairly informed as to the various items of damages which it should take into consideration, together with the proper basis upon which each item is to be assessed.
7. **Trial.** Where an instruction is so worded as necessarily to leave the jury to uncertain conjecture as to the meaning, and there-

fore liable to lead the jury astray in its consideration of the case, it is good ground for a new trial.

8. **Damages.** Damage for permanent injury may not be based upon speculation, probability, or uncertainty, but it must be shown by competent evidence that such damage is reasonably certain as a proximate result of the pleaded injury.
9. **Trial: Damages.** If the court either on request or on its own motion attempts to define a method of arriving at present worth or value of future damages, and the instruction fails to contain a legal or comprehensive definition, it is prejudicially erroneous.
10. **Evidence.** Life tables of expectancy may be properly received in evidence only when there is competent evidence that the claimed injuries are permanent.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Reversed and remanded.

Fraser, Wenstrand, Stryker, Marshall & Veach, for appellant.

Haney & Walsh, William H. Mecham, and Robert D. Mullin, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action for damages for personal injuries and damage to property instituted by Tony A. Zager, plaintiff and appellee, against Janette Johnson, defendant and appellant, growing out of the collision between a truck operated by the plaintiff and an automobile operated by the defendant in Omaha, Douglas County, Nebraska. There was a cross-petition filed by the defendant which was withdrawn at the time of commencement of the trial by stipulation of the parties. At that time it was also stated that the withdrawal was without prejudice to any right of the plaintiff to prosecute his action against the defendant.

By answer the defendant admitted the collision but denied that it resulted from negligence on her part and alleged that it was caused by the negligence of the plaintiff.

The case was tried to a jury and a verdict was returned in favor of the plaintiff for $10,000. Judgment was rendered on the verdict. From this verdict and judgment the defendant has appealed.

The brief of the defendant contains seven assignments of error on the basis of which it is asserted that there should be a reversal of the judgment. It does not appear that each of these requires separate consideration. By the first the defendant urges that a motion to dismiss the action at the close of the plaintiff's evidence should have been sustained. By the second it is urged that a like motion should have been sustained at the close of all of the evidence. The two charge that the evidence was insufficient as proof of plaintiff's pleaded cause of action. But one subject is involved, hence separate consideration is not required.

In most of the particulars there is no material dispute in the facts relating to causation. The accident happened at about 5:30 p.m., on June 4, 1958, within the intersection of Thirty-ninth and Washington Streets, in Omaha, Douglas County, Nebraska. Weather and street conditions were good. The width of Thirty-ninth Street from curb to curb is about 24 feet, as is also the width of Washington Street. Washington Street runs east and west, and Thirty-ninth Street runs north and south. There were no obstructions of view to the intersection either from the north or west. There is a slight incline of Washington Street into the intersection from the west, but Thirty-ninth Street is practically level.

The plaintiff approached and entered the intersection from the north and at all times until the actual collision took place drove with the left side of his vehicle about 2 feet west of the centerline of Thirty-ninth Street.

The defendant approached and entered the intersection from the west and at all times until the collision took place drove with the right side of her vehicle north of the south side of Washington Street, but south of the center.

The collision took place when the front end of the plaintiff's truck was approximately 3 feet north of the south line of Washington Street and to the west of the centerline of Thirty-ninth Street. The front end of the automobile of the defendant struck about the middle of the west side of the truck. The two vehicles came to rest, after striking an automobile stopped to the south, and after plaintiff's truck ran into a tree a short distance southwest of the point of collision. As a result of the collision the defendant's automobile was hooked onto the back end of plaintiff's truck and was dragged until the truck hit the tree.

The undisputed testimony as to the speed of the plaintiff is that he was at all times of concern moving at the rate of 20 to 25 miles an hour. This is not to say however that the evidence as a whole was not capable of inference, under the disclosed circumstances, of a rate of speed which could be said to be in excess of the rate testified to by witnesses.

There was testimony that the speed of defendant's automobile at the time was from 30 to 35 miles an hour. It may not well be said that this testimony was incapable of belief. There also was testimony, not incapable of belief under the circumstances disclosed, that she was moving at a lesser rate. Here was a disputed question of fact.

If the defendant was proceeding at a rate of speed in excess of 25 miles an hour she was operating her automobile in violation of law. See § 39-7,108, R. R. S. 1943. This section provided that a city or village might by ordinance increase the maximum speed above the 25 miles an hour limit, but there is nothing in the record to indicate that the city of Omaha did so. In fact it is stipulated that the speed limit was 25 miles an hour.

There is a material dispute as to which of the parties here approached or entered the intersection first. Under the terms of the statute in force at the time, under circumstances such as are presented here, it is provided

that if two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right. See § 39-751, R. R. S. 1943. This same section however provides that the driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have. This section has been amended but in respects not of significance in this case.

In the light of this it becomes clear that if the defendant was operating her automobile at a speed of not to exceed 25 miles an hour and she approached the intersection at about the same time as did the plaintiff she had the right-of-way and it was the duty of the plaintiff to yield to her. If however on entering the intersection she was exceeding 25 miles an hour she forfeited the right-of-way.

It is pointed out here that a violation of this statutory provision by an operator of a vehicle to the right does not transfer the right-of-way to the one coming from the left, but, if proved, only bars from consideration on a trial the question of right-of-way as an element of negligence.

These questions were in dispute and were substantially submitted to the jury under instructions for determination.

Other pertinent disputed questions of fact were presented by the parties for consideration and determination. There was testimony on behalf of the plaintiff the substance of which was that he approached and entered the intersection at a safe rate of speed in such manner and in the light of observations made of the intersection and of the approach of the defendant as would in the exercise of ordinary and reasonable care have permitted him to pass through the intersection with safety and without collision with the automobile of the defendant.

On the other hand there was evidence which was

capable of an inference that the plaintiff, without cause or justification, without heeding what was in plain view, and without exercising care for his own safety, negligently operated his truck into the path of the automobile.

These questions of disputed fact were required to be submitted to a jury. In Meyer v. Platte Valley Constr. Co., 147 Neb. 860, 25 N. W. 2d 412, it was said: "Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. * * *." See, also, Pankonin v. Borowski, 167 Neb. 382, 93 N. W. 2d 41; Sekora v. Mangers, 171 Neb. 868, 108 N. W. 2d 240.

In opposition to the view that here were questions of disputed fact to be submitted to a jury, it is urged by the defendant that the plaintiff was shown, by the evidence to which reference has been made, to be guilty of contributory negligence in a degree sufficient as a matter of law to defeat a recovery. The controlling rule is stated in Meyer v. Platte Valley Constr. Co., *supra,* as follows: "* * * It is only where the evidence shows beyond reasonable dispute that plaintiff's negligence is more than slight as compared with defendant's negligence, that it is proper for the trial court to instruct the jury to return a verdict for defendant." See, also, Pankonin v. Borowski, *supra;* Sekora v. Mangers, *supra.*

The facts which, under law, were controlling were in dispute, and accordingly the questions in that area were required to be submitted to a jury. The court therefore did not err in overruling the motions to dismiss.

The third and fourth assignments of error deal collectively with different phases of instruction to the jury with regard to damages. Further they deal with the subject of whether or not, though the defendant was not entitled to a dismissal of the action, she is entitled to a new trial. The subjects will be considered without particular reference to the assignments.

By the instruction given by the court the jury was told, subject to other instruction with regard to the

effect to be given to contributory negligence if any was proved, that if its verdict was in favor of the plaintiff the jury would be required to ascertain the amount plaintiff had been damaged to his person and to his personal property, as well as the amount he had been obligated to pay for medical bills.

The jury was further told that in arriving at the amount it should consider loss of earnings, physical and mental pain, and suffering endured at and since the time of the accident and which he may endure in the future as the proximate result of the accident.

The instructions given in this area are not subject to criticism on account of any departure from abstract legal principle, but for the reason, as it is urged, that there is no evidentiary basis therefor. First, there is no evidence upon which to arrive at the damage which the plaintiff had sustained up to the time of trial or will sustain in the future. Second, it is urged that there is no basis for permitting the jury to assess damages on the basis of past and future pain and suffering.

As to the first, the record discloses that the damage to the truck of plaintiff was $775; that there was loss and damage to other property in about the amount of $206; that his total medical expense amounted to $75; that the plaintiff was off work about 3 weeks and he started work on his first roofing job after about 5 weeks; that he was required to employ help to perform work which he had previously done himself; and that this situation as to work obtained at the time of the trial. His business was that of a roofing contractor and the going rate for the work he performed was about $2.85 an hour. Prior to the accident he was able to work from 8 to 10 hours a day, but thereafter only 3½ to 4 hours.

The evidence of injury testified to by the plaintiff was that he spit blood two or three times; the calves of his legs were scratched and bleeding; his arms, chest, and the back of his neck bothered him; he had pain in his chest, arms, legs, back, and neck, and he had head-

aches; and at the time of trial he could not do such lifting as he did before and he had pain in his neck, lower back, knee, and elbow at times.

The doctor who examined the plaintiff in 1958 and again in 1961 testified that he found no broken bones. This testimony was based on his findings and a history given to him by the plaintiff. There is no material difference between the history and the testimony of the plaintiff covering the same subject. There was however a finding made in 1961 which did not appear in any finding in 1958. In 1961 he found some loose bodies in an elbow which he described as traumatic damage which limited use somewhat.

The doctor's attention was not called to the elbow in 1958. The record fails to disclose an opinion or conclusion of the doctor that this condition resulted from this accident. Also there was no other evidence from which a reasonable inference flows that it did so result.

From all of this it is clear of course that there was evidence of damage to property and doctor bills, but there was none from which a finding could be made as to damage in the operation of the business or of personal earnings of the plaintiff up to the time of trial. Also there was none as to how far or to what extent damage would extend into the future.

As to pain and suffering also, there was no evidence upon which to base a finding as to how long, or to what degree it would extend, if it would so extend, into the future.

Notwithstanding this lack of evidence as to damage and the lack of evidence as to duration of disability, the court instructed the jury to take these elements into consideration in arriving at the amount the plaintiff was entitled to recover. This was error on the part of the court of which the defendant has a right to complain.

In Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, this court said: "A jury should be fully and fairly informed as to the various items of damages which it

should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item." See, also, Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N. W. 2d 224.

In Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N. W. 2d 813, it was said: "Where an instruction is so worded as necessarily to leave the jury to uncertain conjecture as to the meaning, and therefore liable to lead the jury astray in their consideration of the case, it is good ground for new trial."

In Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254, it was said: "Damage for permanent injury may not be based upon speculation, probability, or uncertainty but it must be shown by competent evidence that such damage is reasonably certain as a proximate result of the pleaded injury."

In Patras v. Waldbaum, 170 Neb. 20, 101 N. W. 2d 465, it was said: "If the court either on request or on its own motion attempts to define a method of arriving at present worth or value of future damages, and the instruction fails to contain a legal or comprehensive definition, it is prejudicially erroneous." See, also, Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200.

In the light of what has been pointed out with regard to improper and insufficient instructions the defendant is entitled to have the verdict and judgment set aside.

By the fifth assignment of error the defendant urges that the court erroneously overruled a motion to strike certain evidence of plaintiff's doctor made after the completion of the introduction of evidence. This evidence described the condition of plaintiff's elbow at the time of examination made in 1961. In the light of what has already been said herein this is not evidence of causation by the accident, but only of the total condition at the time of examination. It was not objected to at the

time it was given. Under these circumstances it is difficult to see how the refusal to strike could be regarded as ground for reversal.

A mortality table was admitted in evidence on behalf of the plaintiff. This was assigned as error and considered under the sixth and seventh assignments of error. This evidence was erroneously received. This court said in Welstead v. Ryan Constr. Co., 160 Neb. 87, 69 N. W. 2d 308: "Life tables of expectancy may be properly received in evidence only when there is competent evidence that the claimed injuries are permanent." See, also, Lyons v. Joseph, 124 Neb. 442, 246 N. W. 859. As has been already indicated there is here no competent evidence of permanent injury.

For the reasons stated herein the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY KENT, APPELLANT.
116 N. W. 2d 31

Filed June 29, 1962. No. 35200.

1. **Criminal Law: Continuances.** An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error.
2. **Evidence: Appeal and Error.** Affidavits used as evidence on the hearing of an issue of fact must be offered in evidence in the trial court and embodied in a bill of exceptions to be available to appellant in this court.
3. **Criminal Law.** Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.
4. **Larceny: Evidence.** Under the doctrine announced and held in

this state, no presumption of guilt arises from the mere possession of stolen property; the inference to be drawn from such fact is alone for the jury when weighed in connection with all the evidence adduced on the trial.

5. **Larceny: Trial.** The force and effect to be given the fact of possession of stolen property recently after the theft, and the sufficiency or insufficiency of such evidence, are solely for the jury, and it is improper for the court to instruct the jury as to the effect to be given, or the sufficiency of, the evidence, in whole or in part.
6. **Criminal Law: Appeal and Error.** This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Andrew J. McMullen, for appellant.

Clarence A. H. Meyer, Attorney General, Melvin K. Kammerlohr, and Dwain L. Jones, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

BROWER, J.

Stanley Kent, the defendant in the trial court and appellant herein, was charged in the district court for Buffalo County, Nebraska, with the crime of petit larceny. The information contained two counts, the first for stealing two 15-inch automobile tires of the value of $25 each, and two 1952 model Buick automobile wheels of the value of $5 each. The second count sets out that the defendant had previously been convicted of the crime of petit larceny and the offense in the information was his second offense.

The defendant will be so designated herein and the plaintiff, State of Nebraska, as the State.

The defendant entered a plea of not guilty and a trial was had to a jury which returned a verdict of

guilty. After proof of the previous conviction, defendant was sentenced to imprisonment in the Nebraska State Reformatory for not less than 1 nor more than 2 years. His motion for a new trial having been overruled, the defendant brings the matter here on appeal.

The defendant assigns three errors which, though otherwise worded, so far as are necessary for consideration by this court, can be stated and shall be considered as follows: That the trial court erred in overruling a motion for a continuance of the time of trial because five additional names of witnesses were endorsed on the information and the charge was changed 2 days before trial; that the amendments to the information so completely changed the charge and subject matter that the 1-day's preparation allowed the defendant denied him his constitutional rights of due process of law; and that the trial court erred in not dismissing the charge because the evidence was insufficient to sustain a verdict.

The defendant pleaded not guilty and waived preliminary hearing. He was bound over by the county court of Buffalo County on May 19, 1961, upon a complaint charging him with breaking and entering a motor vehicle, and his bond was fixed at $1,000. He was admitted to bail thereafter. An information was filed against him in district court on September 20, 1961, charging him with breaking and entering a 1953 Bel Air Chevrolet automobile with intent to steal property of value therein. The defendant appeared with counsel and pleaded not guilty. On October 7, 1961, an amended information was filed charging him with like breaking and entering a 1953 Bel Air Chevrolet automobile and a 1953 Buick automobile. On October 13, 1961, the county attorney secured leave of court to amend by interlineation; the defendant's counsel made a motion for a continuance because the amendment changed the issue; and the court granted a continuance to the week of October 23, 1961. On October 23, 1961, the State requested leave to file an amended information reducing

the charge from breaking and entering a motor vehicle to the charge of second offense petit larceny, and for leave to add the names of certain witnesses to the information, which was granted. The amended information charging the crime of petit larceny of the tires and wheels was then filed and served on the defendant. Five of the 10 witnesses' names endorsed on the amended information were not on the previous one. The defendant's counsel thereupon orally moved the court for a continuance of the trial because the amended information changed his proposed defense and in order to allow defendant's counsel further time to interview witnesses, which motion was denied by the court.

The trial was had on October 25, 1961. Before trial, defendant's counsel renewed the motion because no continuance was granted at the time of the amendment and the addition of the names had been permitted. The court overruled it and in so doing stated in the record that it was a case involving petit larceny; that it was only a reduction of the charge from that previously filed; and that it involved the same transaction. The cause thereupon proceeded to trial, resulting in the verdict and sentence set out.

In Hyslop v. State, 159 Neb. 802, 68 N. W. 2d 698, this court held: "An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error."

Later, on November 10, 1961, the date of hearing of the motion for new trial, defendant's counsel filed an affidavit elaborating the reasons why the continuance should have been granted and the manner in which the defendant was prejudiced by its not being granted. This was never made a part of the bill of exceptions and cannot be considered by this court. Again, quoting from Hyslop v. State, *supra,* we said: "Affidavits used as evidence on the hearing of an issue of fact must be

offered in evidence in the trial court and embodied in a bill of exceptions to be available to plaintiff in error in this court."

The defendant was represented by the same counsel at least from September 22, 1961, to and through the time of trial. The evidence which will be discussed hereafter makes it plainly to appear that the defendant was apprehended in May 1961, because of his previous possession of the tires taken from a 1953 Buick automobile. He knew the reason for his arrest at the time. His counsel must have known of the issues finally tried from the beginning. It would appear that the trial court's remarks that the amended information was a reduction of the charge and concerned the same transaction were correct. Under the circumstances we cannot say the court's action in overruling the motion was arbitrary or an abuse of discretion. Neither, under the circumstances, was it error to allow the five additional names to be endorsed upon the information. We have held that it is within the discretion of the trial court to allow them to be endorsed pending trial. Shaffer v. State, 123 Neb. 121, 242 N. W. 364. In this instance they were added 2 days before trial. The defendant's assignments of error concerning the endorsement of the names on the information and the refusal of the court to grant a continuance are without merit.

At the close of the State's evidence the defendant moved for a directed verdict because the State had not proved a prima facie case against the defendant. It was overruled by the trial court and the defendant then introduced his evidence. The motion was not renewed at the close of all the evidence.

"Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire

record to sustain a conviction." Henggler v. State, 173 Neb. 171, 112 N. W. 2d 762.

Defendant maintains that the evidence was not sufficient to sustain the verdict. In this respect he contends there is no evidence to show the defendant's implication in the larceny, except finding the stolen tires to have been in his possession thereafter. He cites Henggler v. State, *supra,* which he concedes is a burglary case and is not authority for his contention. Further defendant calls attention to Dobson v. State, 46 Neb. 250, 64 N. W. 956; Williams v. State, 60 Neb. 526, 83 N. W. 681; and Bassinger v. State, 140 Neb. 63, 299 N. W. 293, which he contends establish the rule that proof that a petit larceny was committed with evidence that some of the stolen property was discovered to have been in the possession of defendant is not alone sufficient to make a prima facie case of larceny. These cases hold that finding the defendant in possession of property which was taken in a larceny established by the evidence does not shift the burden from the State, but that the burden of proof continues to rest on the prosecution to prove its case beyond a reasonable doubt, and that instructions to the jury which in effect shift the burden of proof to the defendant on finding the property which was stolen in his possession are erroneous. The rules concerning the consideration of such evidence are set out in Williams v. State, *supra,* as follows: "Under the doctrine announced and held in this state, no presumption of guilt arises from the mere possession of stolen property; the inference to be drawn from such fact is alone for the jury when weighed in connection with all the evidence adduced on the trial. * * *

"The force and effect to be given the fact of possession of stolen property recently after the theft, and the sufficiency or insufficiency of such evidence, are solely for the jury, and it is improper for the court to instruct the jury as to the effect to be given, or the sufficiency of, the evidence, in whole or in part."

In the case before us there appears considerable evidence which the jury might have considered as tending to show the defendant's guilt in connection with, and in addition to, the proof of finding the stolen tires to have been in the possession of the defendant.

The tires and wheels were owned by Leonard McKean, a used car dealer of Kearney, Nebraska. They were on a Buick automobile which he had recently purchased and placed on a lot used by him to store cars at 1220 Fifth Avenue in that city. McKean went to this car lot on March 22, 1961, and found the front end of the Buick on which the tires and wheels in question had been left let down on the ground and the front tires and wheels gone. The hubcaps were lying by the car with the nuts that held the wheels on therein. The tires were comparatively new Atlas tires which had been purchased on November 29, 1960, by Howard Swartz from whom McKean had purchased the car. McKean testified the tires were worth $25 each and the wheels $5 each. Swartz had the guarantee agreements on the tires issued by Gordon Baker who operates a Standard Oil station at Elm Creek, Nebraska. The tires recovered were identified as those on the car by McKean and Swartz. The latter put them on the front end of the Buick automobile before trading it to McKean. On April 22, 1961, R. T. Nelson, chief of police of the city of Kearney, stopped a car driven by Wayne Wiemers from which he took the two Atlas tires later identified as those stolen. Wiemers was taken to the police station and he there stated he had purchased them from the defendant. Wiemers testified that he had purchased the tires about 3 weeks before from the defendant for $15 and that they were taken from defendant's car and placed on that of the witness in the presence of two other witnesses who testified also. A witness testified that he had previously noticed the tires on the back wheels of the defendant's car, that they appeared too large for that car, and the back of the car appeared to be higher than the front end

when he saw them on it. After Wiemers had related his story to the police the defendant was arrested by Lloyd L. Frank, sheriff of Buffalo County, Nebraska, on May 18, 1961, on a warrant issued April 25, 1961. Defendant was taken to Kearney by Frank. The sheriff testified that the defendant on this trip stated he had sold tires to Wiemers. He did not admit stealing the tires. McKean testified that on Easter Sunday, which from the evidence was April 2, 1961, the defendant came to his home and stated he wanted McKean to make a list and figure the amount of the things taken from the lot, and that he would pay for them. McKean had reported to the police the taking of other items also. The defendant did not admit he had taken anything. When the witness asked him if he had the wheels he answered he did not have them. When asked why he was there trying to pay for them if he didn't have them, he answered that he thought it would be cheaper. The lot where the car from whence the tires and wheels were taken was several blocks from the home of defendant, but there was an alfalfa field between, and each of the premises could be seen from the other. The defendant later took the stand in his own defense. The substance of his story with respect to obtaining the tires follows. He first saw the tires in question at Foote's Filling Station in Kearney. Defendant was then having tire trouble and his car was jacked up there in front of the garage part of the station property where his tires were being fixed. He walked into the cafe portion of the station. There was a man standing there, they became engaged in conversation, and the man asked defendant if he wanted to buy some new tires for his "wreck." Defendant went out and looked at them and they dickered for the price. Defendant finally purchased the tires for $20, the man throwing in four quarts of oil also which he had. Defendant was not sure whether the man had a car with a Nebraska or out-of-state license, but thought it was a Kansas car. It had a white license plate and

was a 1949 to 1951 green Mercury. The man gave him a receipt which was not introduced in evidence but from which the witness testified that the man's name as given him therein was Dan Weeks. The deal was made in the latter part of March or early in April 1961. The defendant stated that one of his tires was being repaired in front of Foote's Filling Station at the time of the purchase. This was about 11:30 or 12 o'clock at night and the repair work was being done by an elderly man, a filling station attendant at Foote's station whose name was not known to him. The purchase of these tires was not corroborated. Defendant admitted that he went to McKean and asked him to find out what had been taken and the sum of it. He stated however this was about the 20th or 21st of May 1961, while he was out on bond. He did this he said because he felt it would be cheaper than to defend the lawsuit.

There was testimony by defendant's father and brother substantiating the defendant's testimony of his working on his own car at his home until late on the night when the tires were taken, and thereafter his going to bed which tended to show an alibi.

The whole matter was submitted to the jurors who were the exclusive judges of the facts. There was ample evidence which, if believed by the jury, was sufficient to warrant the verdict it returned.

"This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873.

It follows that the judgment of the district court on the verdict of the jury should be affirmed.

AFFIRMED.

MARY C. CARD, APPELLANT, V. CLYDE F. CARD, APPELLEE.
116 N. W. 2d 21

Filed June 29, 1962. No. 35230.

1. **Judgments: Pleading.** Res judicata is ordinarily an affirmative defense. It is only when it affirmatively appears to exist from the petition itself that it affords a basis for sustaining a general demurrer.
2. **Divorce.** A divorce decree is ordinarily considered a final adjudication of the property rights of the parties, and may not be modified after 6 months from its rendition except when it lacks the attributes of a final judgment, where reservations are contained in it which lay the foundation for a modification, or where changed circumstances can be shown.
3. ———. A provision in a divorce decree that a gross award of alimony shall be paid in installments and that liability for such installments shall cease on the death or remarriage of the wife are not void as being against public policy.
4. **Judgments: Fraud.** In order to avoid a judgment on the ground of fraud in obtaining it, the facts constituting the fraud must be pleaded and proved.
5. **Pleading.** A demurrer to a pleading admits only such facts as are well pleaded. A pleading which alleges only a conclusion of law or fact does not state a cause of action and is subject to demurrer.
6. **Divorce.** An allegation that the termination of installments on a gross award of alimony are oppressive, unconscionable, and inequitable do not state a cause of action in a collateral attack upon a final judgment.
7. **Divorce: Attorney and Client.** A party to a divorce action will not ordinarily be required to pay attorney's fees for the benefit of the wife's legal counsel in a case involving the wife's collateral and unjustified attack upon a decree of divorce which has become final.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Robert L. Jeffrey and Richard L. Goos, for appellant.

Beynon, Hecht & Fahrnbruch, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

Plaintiff filed a petition seeking the modification of

a divorce decree to which she was a party. The defendant demurred generally to the petition. The trial court sustained the demurrer and granted time to further plead. Plaintiff elected to stand on her petition and the trial court dismissed the action. Plaintiff has appealed to this court.

The record shows that plaintiff obtained a divorce from the defendant on November 21, 1957. Prior to that date and on October 8, 1957, the parties entered into a written property settlement agreement. The trial court approved and incorporated the terms of the property settlement into its decree. No question arises concerning the division of the property of the parties, except the award of $33,875 to the plaintiff. With reference thereto, the decree states that in addition to the real and personal property which the said Mary C. Card is to have, "Clyde F. Card shall pay to Mary C. Card as permanent alimony, the sum of $33,875.00, which sum to be payable as follows: The sum of $5,000.00 shall be paid immediately upon the approval of this settlement by the Court and the granting of an absolute divorce. The balance of said sum shall be paid by the said Clyde F. Card to the said Mary C. Card in monthly installments of $137.50 each beginning on the first day of October, 1957, and continuing on the first day of each and every month thereafter to and including the first day of March, 1975; provided, however, that in the event of the death or the remarriage of the said Mary C. Card, all monthly payments not then paid nor due shall be forever cancelled and the said Clyde F. Card shall be wholly relieved of his obligation to make any further or other payments."

It is true that this court has condemned monthly installments as a proper method of allowing alimony without the fixing of the gross award. Such a method is not void, however. On appeal, on a trial de novo, this court has modified decrees to provide for an allowance of alimony in a fixed amount and permitted payment in in-

stallments where the financial circumstances of the husband required that this be done. See Metschke v. Metschke, 146 Neb. 461, 20 N. W. 2d 238.

The decree provided that the defendant should pay the plaintiff $33,875, said sum to be payable as follows: $5,000 upon the granting of the divorce and $137.50 each month thereafter, provided that in the event of the death or remarriage of the plaintiff the obligation of the defendant to make further installments ceased. The trial court made a division of property and in connection therewith made an allowance of a gross amount in the nature of monthly support. It is the contention of the plaintiff that the proviso terminating the monthly installments upon the death or remarriage of the plaintiff should in effect be deleted from the decree for several reasons which will be discussed hereafter.

It is contended that the proviso is against public policy. We think not. It fixes the termination date of the payments upon the total payment of $33,875, or upon the death of the plaintiff, or upon her remarriage, whichever first occurs. It is not an unreasonable restraint on marriage. It is a means of fixing the amount of alimony to be paid under the different circumstances therein set out. The decree is in the language of the property settlement agreement, which language is plain and definite, and easily understood. The parties as well as the court appear to have considered the fact that the support of plaintiff in case of remarriage devolves upon the new husband from which the prior husband should be relieved.

Plaintiff contends that she did not understand the language of the property settlement nor the similar language of the decree. As we have said, the language used was so simple and plain in meaning that we can give no credence to the contention that plaintiff did not understand exactly what it meant.

The petition asserts fraud in general terms. No facts are pleaded that even tend to support this allegation.

A demurrer does not admit conclusions of either law or fact. Dodson v. F. W. Woolworth Co., 118 Neb. 276, 224 N. W. 289. The allegations of fraud were clearly vulnerable to demurrer. Thomas v. Thomas, 33 Neb. 373, 50 N. W. 170, 29 Am. S. R. 483.

The petition alleges that the proviso of the decree relating to plaintiff's death or remarriage results in a forfeiture of her rights in the monthly payments, and are oppresive, unconscionable, and inequitable. There are no allegations of fact to support this assertion. The purpose of the provision relating to remarriage was to relieve the defendant from the support of his former wife if she should become the wife of another who would be charged with her support. We find nothing unlawful or inequitable in such a provision in a divorce decree, particularly when it is the result of a formal written property settlement. The decree has such finality that the law of res judicata applies to it and it may not be attacked collaterally after it has become final. The cases cited by the plaintiff were direct appeals and not collateral attacks as here. See, Holmes v. Holmes, 152 Neb. 556, 41 N. W. 2d 919; Swanson v. Swanson, 137 Neb. 699, 290 N. W. 908. In Young v. Young, 138 Neb. 294, 292 N. W. 923, this court stated: "A divorce decree is usually considered a final adjudication of the property rights of the parties, and may not be revised or altered after the expiration of six months from the date of its entry." See, also, Ziegenbein v. Damme, 138 Neb. 320, 292 N. W. 921.

Plaintiff contends, however, that res judicata is an affirmative defense and may not be determined on a general demurrer to plaintiff's petition. While this is ordinarily true, the rule is to the contrary when the petition sets forth the facts to which the rule of res judicata applies. Marsh-Burke Co. v. Yost, 102 Neb. 814, 170 N. W. 172; In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 293.

Plaintiff claims that section 42-324, R. R. S. 1943, au-

thorizes the trial court to grant the relief here sought. This provision of the statute states in part: "* * * the court, from time to time, on the petition of either of the parties and hearing thereon, may revise and alter such decree respecting the amount of such alimony or allowance, * * *." This statute was interpreted in Graham v. Graham, 135 Neb. 761, 284 N. W. 280, as meaning that a decree of divorce is res judicata as to all matters existing at the time it was rendered. In order to secure a revision of a divorce decree having such completeness and finality as to possess the attributes of a final judgment, new facts occurring since the decree was entered must be shown. Estoppel by previous judgment extends to all matters properly before the court which the parties might have litigated, unless changed conditions are pleaded and proved. See, also, Ziegenbein v. Damme, *supra;* Young v. Young, *supra.*

Unless the foregoing rule be correct, finality in divorce decrees could never be attained. It is only where a divorce decree lacks the attributes of a final judgment, or reservations are contained in it that lay the foundation for modification, or where changed circumstances can be shown, that a divorce decree, otherwise final, may be modified after 6 months from the rendition of the decree. In the instant case the petition fails to show that any of the factors exist which would authorize a modification of the decree. The general demurrer was properly sustained and the action dismissed.

The plaintiff assigns as error the refusal of the trial court to award attorney's fees to her under the provisions of section 42-308, R. R. S. 1943. She asks us to allow attorney's fees for services rendered in the trial court and this court as well. We do not think attorney's fees should be allowed the plaintiff in this case. Defendant, so far as the record shows, has complied with the divorce decree rendered in 1957 with respect to the division of property made and the alimony allowed. Plaintiff appears to have the means to pay her own

attorney. The suit is an attempt to modify a final judgment containing a financial settlement to which she agreed. A defendant will not ordinarily be required to pay attorney's fees under such circumstances. A party to a divorce action will not ordinarily be required to pay attorney's fees to the wife for the benefit of the wife's legal counsel in a case involving a collateral and unjustified attack upon a divorce decree which has become final. See, Smallcomb v. Smallcomb, 165 Neb. 191, 84 N. W. 2d 217; Sechser v. Sechser, 162 Neb. 486, 76 N. W. 2d 412; Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808. The trial court properly denied plaintiff's request for the allowance of attorney's fees and they are likewise denied in this court. The costs of the appeal are taxed to plaintiff.

The judgment of the district court being correct, it is affirmed.

AFFIRMED.

KEITH S. SCHWARTZ AND KENNETH P. SCHWARTZ, EXECUTORS OF THE ESTATE OF JOSEPH SCHWARTZ, DECEASED, APPELLANTS, V. B. R. HIBDON, FIRST AND REAL NAME UNKNOWN, DOING BUSINESS AS OIL FIELD DOZER SERVICE, ET AL., APPELLEES.
116 N. W. 2d 187

Filed June 29, 1962. No. 35266.

1. **Automobiles: Negligence.** Generally it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision.
2. ———: ———. Reasonable control by the operator of a motor vehicle is such as will enable him to avoid an accident involving another motor vehicle operated without negligence.
3. ———: ———. The driver of the front motor vehicle owes no duty to the rear or trailing vehicle except to use the road in the usual way, in keeping with the laws of the road, and until he has been made aware of it, by signal or otherwise,

he has a right to assume either that there is no other vehicle in close proximity to his rear or that, being there, it is under such control as not to interfere with his free use of the road in front of and to the side of him in any lawful manner.

4. ———: ———. Where one driving a motor vehicle is suddenly confronted by an emergency, requiring instant decision, he is only required to demean himself as an ordinary, careful, and prudent person would have done under like circumstances, and if he does that he is not held to be negligent.
5. ———: ———. The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it.
6. ———: ———. Where the driver of a motor vehicle upon a public highway, in attempting to pass another vehicle from the rear, operates his vehicle in such a manner as to strike the other vehicle in passing, he is ordinarily guilty of negligence when the driver of the vehicle being passed is without fault.
7. ———: ———. Conditions affecting the visibility of a motorist impose upon the driver the duty to exercise a degree of care commensurate with existing circumstances.
8. ———: ———. A motorist overtaking and passing another motor vehicle must exercise vigilance commensurate with the surrounding circumstances.

Appeal from the district court for Cheyenne County: JOHN H. KUNS, Judge. Reversed and remanded.

Heaton & Heaton and Leon A. Sprague, for appellants.

Halcomb, O'Brien & Everson and Harry R. Meister, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action for wrongful death as a result of a rear end collision. The trial court sustained defendants' motion for a directed verdict at the close of plaintiffs' evidence. Plaintiffs' motion for new trial was overruled, and plaintiffs appeal.

The action was brought by the appellants, who are the executors of the estate of Joseph Schwartz, deceased, for

the exclusive benefit of the next of kin who sustained pecuniary loss. The executors will be hereinafter referred to as appellants. The defendants and appellees are B. R. Hibdon, first and real name unknown, doing business as Oil Field Dozer Service, and Kenneth H. Thompson. They will be hereinafter referred to as Hibdon, Thompson, or appellees.

The parties stipulated that Hibdon was the owner of the equipment being driven by Thompson, and that Thompson was one of Hibdon's employees on September 28, 1960. There is no question but that at all times pertinent herein the relationship of master and servant existed. The equipment driven by Thompson was a 190 four-wheel International truck, which was pulling an eight-wheel Fruehauf lowboy trailer, which trailer was carrying an HD9 Allis-Chalmers tractor mounted with a bulldozer blade. The combined weight of the tractor and equipment was 36,000 pounds.

Thompson was the only eyewitness to testify. From his testimony we determine the facts to be that between 9 and 10 o'clock a.m. on September 28, 1960, Thompson was driving this equipment east on U. S. Highway No. 30 at about 40 miles per hour. When he was at a point he estimates to be 1,000 feet west of the intersection of highway No. 30 and a north and south county road 2 miles west of Potter, Nebraska, he observed Joseph Schwartz, hereinafter referred to as the deceased, driving a farm tractor pulling a pickup, approaching a stop sign on the county road. Thompson testified deceased did not bring the equipment to a stop at the stop sign protecting the highway, but, turning the equipment onto highway No. 30, he proceeded east. He further testified that deceased at all times drove the equipment to the right of the centerline; that there was nothing to obstruct his vision; and that he observed the deceased, who was traveling at a speed of 5 to 7 miles per hour, from the time he came onto the highway until the impact. The impact occurred at a point at least 700 feet

east of the intersection of highway No. 30 and the county road.

When the deceased came onto the highway Thompson slackened his speed until he was down to 20 miles per hour. There was a car between him and the deceased, which passed the deceased. After Thompson reached the intersection of highway No. 30 and the county road, a milk truck, which had been behind his truck, passed him and then passed the deceased. When it returned to its own lane of traffic in front of the deceased, Thompson looked in his rearview mirror and, not seeing anyone behind him, started to pull out to pass the deceased. He swung out at 20 miles per hour and started gaining speed. When he was a "couple feet" over the centerline, he again looked in his rearview mirror and saw a car in the westbound lane to his rear, overtaking him and attempting to pass, so he sounded his horn and cut right back. He was then 50 to 75 feet from the deceased. He could not stop so he headed for the ditch, and the left end of his front bumper caught the center of the tailgate of the pickup, pushing it loose and north across highway No. 30. The farm tractor rolled completely over and the truck came to a stop, with its front bumper on the rear wheels of the farm tractor.

It was Thompson's testimony that at the time of the impact the truck was practically off the pavement but the part which hit the pickup was on the pavement. The deceased had made an attempt to turn off the pavement onto the right shoulder. The shoulder on both sides of highway No. 30 was 10 to 12 feet wide.

The deceased was thrown off the tractor by the impact and had fallen on the pavement. He was unconscious at the scene and much of the time until his death in the hospital at Sidney, Nebraska, at 11:15 o'clock the next night.

Thompson, in his deposition before the trial, described his cutting back as follows: " 'Then I met the westbound traffic and let them clear, and the traffic behind me

pass, and by then I was down to approximately 20 miles an hour—I had to gear down—and I swung out to start to pass, checked the rear-view mirror first, and swung out to pass, checked the mirror again and a car come from behind, and I cut back in again and put on the brakes and pulled the air horn, and I saw I couldn't stop, and I cut for the ditch, and the shoulder there is about 12 feet wide and fairly gentle sloping to the ditch; I figured I could ditch the truck and trailer rather than hit the back of the pick-up, and about that time, evidently he had heard the air horn, and he cut to the right.'"

Thompson also testified that because of the bulldozer on the trailer he had a blind spot so that his vision to the rear was obstructed directly behind him for approximately 150 feet, but that a car would have to be in the exact position for him not to see it with one of his rearview mirrors. In this connection, we note that when Thompson saw the car attempting to pass, it was out in a passing position in the westbound lane behind him. It seems that if he was as alert as he testified, he should have seen the car when it came from the blind spot over into the westbound lane. His testimony is that it was only when a car was "tailgating him," to use his attorney's expression, that he could not see it. As soon as it moved to either side he could pick it up in one of his rearview mirrors.

The trial court specifically found that the appellants' evidence was "* * * insufficient to raise any issue of defendants' liability," discharged the jury, and sustained appellees' motion for dismissal at the close of appellants' case.

Before discussing this point, we will consider appellees' plea of contributory negligence. Appellees urge that the deceased was guilty of contributory negligence in failing to stop at the stop sign and in driving a slow-moving vehicle onto highway No. 30 in front of appellees' oncoming truck.

Clearly, any failure to stop at the stop sign could not have been the proximate cause of the collision. Accepting Thompson's statement, which from the respective speeds is patently on the conservative side, that his truck was 1,000 feet west of the intersection when the deceased came on the highway, yet the deceased was able to make the turn and to travel on his own side of the highway in full view of oncoming traffic for a distance of 700 feet. The fact that the car between appellees' truck and the deceased passed deceased without incident, and a milk truck which was behind appellees' truck was able to pass and to return to the right lane of traffic ahead of deceased, clearly negatives the failure to stop at the stop sign as being any part of the proximate cause.

Appellees also complain that the speed of the deceased's vehicle was too slow. It was undoubtedly the usual speed for the type of equipment involved. However, the speed estimate is Thompson's. The deceased at all times was in full view of Thompson, who was fully conscious of the speed at which the deceased was traveling. The testimony of Thompson is also that deceased's farm tractor was moving off the pavement when struck, evidently in response to Thompson's air horn when he started to cut back to the right lane.

As we view Thompson's testimony, there is no issue of contributory negligence in this record, so the question remains whether Thompson was guilty of negligence sufficient to create a submissible issue. We determine there is a question as to his negligence and the ruling of the trial court was in error. In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him. Dryer v. Malm, 163 Neb. 72, 77 N. W. 2d 804. We believe the question is not so much whether there was a submissible issue for a jury as whether Thompson was negligent as a matter of law.

The facts must be considered in the light of the rule

that generally it is negligence as a matter of law for a motorist to drive an automobile on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision. See Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669.

Thompson was driving equipment weighing 18 tons. He knew deceased's equipment was traveling not to exceed 7 miles per hour. He knew he had a blind spot for 150 feet behind his truck. There was nothing to obstruct his front vision, and he was at all times able to see the movement of the deceased ahead of him. He had watched deceased travel 700 feet. At a speed of 7 miles per hour, this would take deceased at least 70 seconds. Thompson had driven the same truck and load on other occasions and should have known that equipment weighing 18 tons traveling at 20 miles per hour could not be stopped in 50 to 75 feet. Yet he attempted to pass at that distance without being certain that there was no car in the blind spot behind him or in so indicating his intention that a car behind him would make its presence known. He had a clear duty to exercise due care in attempting to pass the deceased. We do not believe he did. It is also evident he did not have his truck under reasonable control when he attempted to pass. We have said reasonable control by the operator of a motor vehicle is such as will enable him to avoid an accident involving another motor vehicle operated without negligence. Stanley v. Ebmeier, 166 Neb. 716, 90 N. W. 2d 290.

Appellees, as one of their propositions of law, quote the following from 5 Am. Jur., Automobiles, § 280, p. 656: "The driver of the front car owes no duty to the rear or trailing car except to use the road in the usual way, in keeping with the laws of the road, and until he has been made aware of it, by signal or otherwise, he has a right to assume either that there is no other automobile in close proximity to his rear or that, being there, it is under such control as not to interfere with his free use

of the road in front of and to the side of him in any lawful manner."

It seems to us that the appellees have confused their parties. It is not the driver of the car behind the truck who is involved in this action. The appellants are the personal representatives of the driver of the vehicle Thompson was trying to pass. They are the ones who are entitled to the benefit of the rule. This rule did not excuse Thompson when he acted on it to the detriment of the driver of the vehicle in front of him to whom he owed a duty to observe due care when he attempted to pass. To put it another way, if Thompson owed no duty to the unknown driver coming from the rear, how can that absolve him from his negligence in pulling back to the right and running into deceased.

Appellees also urge upon us the rule: "Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is only required to demean himself as an ordinary, careful, and prudent person would have done under like circumstances, and if he does that he is not held to be negligent." This is the sudden emergency rule we enunciated in Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689. It is not applicable to the facts in this case. It may well be that when Thompson became aware of the car behind him, he was in an emergency situation from which he could not extricate himself. Yet the situation was one of his own making. It was brought on by his own actions and omissions. It was nothing to which the deceased contributed in any way. He cannot relieve himself of his duty to deceased by creating an emergent situation.

As we said in Stanley v. Ebmeier, 166 Neb. 716, 90 N. W. 2d 290: "The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it." The sudden emergency here, if there was one, was brought about

by the failure of Thompson to use due care to avoid it.

Stanley v. Ebmeier, *supra,* is a case very similar to the instant case. It also involved a rear end collision. Briefly, the facts in that case are that plaintiff entered the highway from a private road and turned west. Defendants' oil truck was at that time about 1,000 feet east, also traveling west. Plaintiff proceeded at about 25 to 30 miles per hour. The defendant driver at the time was going about 40 to 50 miles per hour. At a point 1,767 feet west of where plaintiff entered the highway there was an intersection for which plaintiff slowed down and gave a signal of his intention to turn south. Plaintiff reduced his speed to 15 to 20 miles per hour and defendant reduced his speed to 30 miles per hour. A flat-bottomed truck and a Buick, both proceeding east, passed plaintiff east of the intersection. After defendants' oil truck passed the flat-bottomed truck, the driver turned to the left to pass plaintiff's pickup, saw the Buick coming toward him, then tried to miss both of them, but swerved to the north and ran into the plaintiff's pickup truck. The defendants pleaded contributory negligence of the plaintiff and a sudden emergency. We sustained a judgment for the plaintiff and said: "The findings of the jury favorable to appellee are supported by the evidence. If there is evidence which will sustain a finding for the litigant who has the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law."

In Johnson v. Schrepf, 154 Neb. 317, 47 N. W. 2d 853, we held: "Where the driver of a motor vehicle upon a public highway, in attempting to pass another vehicle from the rear, operates his vehicle in such a manner as to strike the other vehicle in passing, he is ordinarily guilty of negligence when the driver of the vehicle being passed is without fault." While in this case the driver changed his mind and did not pass, but turned back and struck the rear of the vehicle of the deceased, the reason for the rule is still applicable. In this case,

the deceased was without fault and there is nothing he could have done to have avoided the collision except not to be where he had a perfect right to be. Thompson's duty in passing the deceased was to be certain he had sufficient clearance to pass before attempting to do so. Sufficient clearance would require a sufficient stopping distance behind the deceased if he decided not to complete his act and to return to his former lane of traffic.

The crux of this case is that Thompson's view of part of the highway behind him was obstructed and he knew it. His duty therefore was greater than under normal circumstances. We have frequently held that conditions affecting the visibility of a motorist impose upon the driver the duty to exercise a degree of care commensurate with existing circumstances. Pierson v. Jensen, 148 Neb. 849, 29 N. W. 2d 625. The same reasoning should be applicable here. We hold that a motorist overtaking and passing another car must exercise vigilance commensurate with the surrounding conditions.

Appellees' motion for a directed verdict was sustained at the close of the appellants' evidence. The appellees' evidence is not before the court although Thompson was called as a witness for the appellants. The appellants argue that the evidence establishes that Thompson was guilty of negligence as a matter of law. That question was not and could not be presented to the trial court at that stage of the proceedings. Consequently, that issue is not before this court at this time so we make no determination in regard to that question.

There were errors in ruling on evidence with reference to the admissibility of the statement given by Thompson to the highway patrolman which we assume will not occur at the next trial, so they are not discussed herein.

For the reasons given above, we reverse the judgment of the trial court and remand the cause for a new trial in conformity with this opinion.

REVERSED AND REMANDED.

W. G. MCCUBBIN, APPELLANT, V. VILLAGE OF GRETNA, NEBRASKA, APPELLEE.

116 N. W. 2d 287

Filed July 6, 1962. No. 35165.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Trial: Appeal and Error.** The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed on this court on review of the findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings.
3. **Injunctions: Municipal Corporations.** Courts will consider, among other things, whether an injunction would not destroy the sewer system of a city, and subject the public to serious inconvenience and danger.
4. **Eminent Domain: Municipal Corporations.** Property may be appropriated by a public corporation for the discharge from its sewage plant, but it is liable for any damage caused thereby.

Appeal from the district court for Sarpy County: JOHN M. DIERKS, Judge. Affirmed.

Eisenstatt & Lay, for appellant.

Wells, Martin, Lane, Baird & Pedersen, for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

CHADDERDON, District Judge.

W. G. McCubbin commenced this action against the Village of Gretna to permanently enjoin it from running the discharge from a sewage disposal plant erected by the village across his land described as the northeast quarter and the east half of the northwest quarter

of Section 35, Township 14 North, Range 10 East of the 6th P. M., in Sarpy County, Nebraska, which is located north and west of the village, which discharge, he alleges, contains excess water, refuse, and material which collected on the plaintiff's land causing a swampy area and creating offensive odors, attracts flies, mosquitoes, and insects causing an unhealthy condition, and prevents the plaintiff from moving farm machinery from one part of the farm to another. The plaintiff further alleges that the value of his farm has decreased and that the flow from the sewer plant is a nuisance.

The Village of Gretna in its answer alleges that said sewage disposal plant was built in accordance with plans approved by the Department of Health of the State of Nebraska and is free from odors; that its discharge from the sewer plant flows into a natural watercourse fed by springs; that the deposits on plaintiff's farm is caused by sediment from fields and barnyards in the natural drainage basin of the watercourse; that ground water level and improper farming operations of the plaintiff have caused the swampy area; that it has a perpetual easement granted by the former owner of the land; and that the damage to the land, if any, occurred before the purchase of the land by the plaintiff.

The parties agree that the matter of damages was a matter incidental to the equitable and injunctive relief sought so that it could be disposed of by the court without a jury.

The trial court found for the defendant and, among other things, found that the creek in question was a spring-fed watercourse; that the plaintiff was entitled to use it for the discharge from its sewer plant; that the treatment plant was properly constructed and efficiently operated; that there was no offensive odor, flies, or mosquitoes resulting from the discharge of the sewer plant; that such an operation was not a nuisance; that the defendant had acquired no right to use the watercourse

for all times and under all circumstances; that the former owner had been paid for constructing a ditch through his land; that plaintiff was in the same position as the former owner; that these findings apply only so long as defendant operates its present treatment plant within its capacity and in an efficient manner; and that if at a future date a change is made, the plaintiff could apply to the court for appropriate relief.

W. G. McCubbin will hereafter be referred to as plaintiff, and the Village of Gretna will hereafter be referred to as defendant.

In order that we may understand the problem before us we shall set forth certain matters of evidence as shown by the bill of exceptions. The evidence is not in conflict except in a few instances and, although this case is tried de novo in this court, the rule announced in Walla v. Oak Creek Township, 167 Neb. 225, 92 N. W. 2d 542, applies, which rule is: "There is a good deal of evidence relating to material matters that is in irreconcilable conflict. We have often stated that: 'Actions in equity on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.' Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786. See, also, Town of Everett v. Teigeler, supra; Mader v. Mettenbrink, supra; Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602."

The trial court, by agreement of the parties, viewed the premises at the time of the trial. This court in Walla v. Oak Creek Township, *supra*, said: "At the conclusion of the trial appellants' counsel requested the trial court to view the premises, which request the trial court granted. In view thereof the following has application: 'The trial court is required to consider any competent

and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings.' Mader v. Mettenbrink, supra. See, also, Town of Everett v. Teigeler, supra."

Defendant in 1951 employed an engineering firm to design a sewer treatment plant. This firm designed such plant, the plans were approved by the Department of Health and the State of Nebraska, federal funds were obtained, the plant was built and completed on March 27, 1953, and began its operation soon thereafter. This is what is called a complete treatment plant which has an efficiency of approximately 90 percent. There has been no metering of the flow but the engineers estimated that the flow would be 15,000 gallons per day. The plant was designed so that the water from the plant would fill a tank, when the tank was full this water would be dumped, and there would be no flow until the tank refilled. At different times of the day the flow was more rapid than at other times. The plant at the time of the trial was utilizing approximately 20 to 25 percent of its hydraulic capacity and was being operated efficiently.

The water from the plant was drained into a waterway that was fed by springs and drained an area of land. After rains and after the snow melted a considerable amount of water ran down this waterway. The spring in this waterway was just east of the sewer plant. The water ran generally west and, after going through a culvert under the railroad track and the county road, entered the land of the plaintiff and flowed over the farm land for some distance, then into a gully, and on into the Elkhorn River. At the time this plant was built in 1953 this land was owned by Hugo Schnack who sold it to the plaintiff and possession was surrendered on March 1, 1959. There is some conflict in the evidence

about the flow of water during the summer when there was no rain. Schnack testified that he planted corn in the area from the east side of his land to the gully and, except for a few days after a rain, he could find a place to cross this waterway with farm implements, but after the installation of the sewer plant there were times when he could not go across it with farm machinery. Before the installation of the sewer plant the course of the water through the farmland would change due to debris coming down with the drainage water and sometimes there were deposits of 8 or 9 inches of silt, although there was evidence that several years before there was a well-defined channel. Some members of the village board called on Schnack and asked him what they could do to make it all right with him for the sewer going through his land. He said: "If you put me a ditch through there I will—and I don't have no damages from livestock maybe getting poisoned or any chemicals or any other damages, * * *. I don't want anything for it." The defendant tried to get the ditch dug and could not do so. Later Schnack employed a man to dig the ditch at a cost of $270, and the defendant gave him a check for $300. The defendant also asked him to sign an easement, which he refused to do, saying that he would rather give back the money than to sign the easement. The plaintiff purchased the land from Schnack but did not know that the water from the sewer plant was running across the place until March of 1959. At the time of the trial the land was in the soil bank with the area from the culvert under the road on the east side of the plaintiff's land to the gully planted to brome grass and alfalfa. It had been difficult for the plaintiff to plow this land to seed it and also difficult to mow, which was necessary under the soil bank agreement. There was some evidence that at some times there was an offensive odor from the water but about 2 months before the trial the defendant commenced using a chemical called Sol-Vax for this odor. There was much other testimony and many exhibits in-

troduced, all of which have been studied by this court. We think that this is a sufficient summary of the evidence for a decision by this court except to say that the plaintiff offered no testimony that there was any other way to dispose of the water from the sewer plant than to suggest that a lagoon system might have been used, and there was no showing that the soil was of the kind necessary to make such a system efficient.

After a motion for new trial was overruled the case was appealed to this court.

The first assignment of error is that the court erred in finding that there was no unlawful diversion of water by the defendant upon the plaintiff's land. This assignment is not good. The plaintiff's petition did not allege that the defendant unlawfully diverted water but at the close of the plaintiff's evidence the plaintiff moved to amend his petition by adding to the petition in several paragraphs the words, "unlawfully diverted," so that the petition would have read, "unlawfully diverted water," arguing that this would make the petition conform to the proof. This motion was overruled by the court. The overruling of this motion is not set out as an error in the brief of the plaintiff. Since the rules of this court provide that errors not assigned nor discussed will not be considered, the overruling of this motion by the court cannot be here considered. Trute v. Skeede, 162 Neb. 266, 75 N. W. 2d 672. Because of the overruling of the motion to amend the pleadings which was overruled the issue of "unlawfully diverted water" was not presented to the trial court and the plaintiff cannot assign an error which was not before it. Sleezer v. Lang, 170 Neb. 239, 102 N. W. 2d 435.

The other assignments of error, being five in number, will be considered together because they are all related and have to do with the right of the defendant to run the effluent from the sewer plant across the land of the plaintiff and whether the plaintiff had the right to revoke any

rights which the defendant had acquired after he, the plaintiff, purchased the land.

There is no assignment of error because the trial court failed to assess damages and what has been previously said in this opinion about assignment of error number one applies to the matter of damages so that it is not considered in this court.

In Richardson v. Kildow, 116 Neb. 648, 218 N. W. 429, the court said: "The writ of injunction is not wholly a writ of right, and may be withheld, in the discretion of the court, when it is likely to inflict greater injury than the grievance complained of; this principle is specially applicable where the interests of the public are involved." Also in Hall v. City of Friend, 134 Neb. 652, 279 N. W. 346, the court said: "Courts will consider, among other things, whether an injunction would not destroy the sewer system of a city, and subject the public to serious inconvenience and danger. * * * Under the facts in this case, the erection of a sewage disposal plant having been properly done, without negligence, it will be held to be a lawful exercise of power that equity will not restrain."

There is no doubt that the defendant had the right of eminent domain and could have obtained an easement over this land for the flow of the sewer effluent but instead it elected to pay the owner of the land for the digging of a ditch which was all he wanted and thereby acquired a right which could not be revoked or canceled by the owner. In Martin v. Fillmore County, 44 Neb. 719, 62 N. W. 863, the court said: "Land is appropriated when its corpus is seized and devoted to the improvement so as to deprive the owner of the use of the land. The nature of the estate in the land which is appropriated may possibly affect the amount of recovery, but does not affect the right to recover." See, also, Stuhr v. City of Grand Island, 120 Neb. 491, 233 N. W. 886. The plaintiff purchased this land with the effluent flowing through it which gave him notice that the defendant claimed

some right, even though he did not discover it until after the purchase, which indicates only that he might have been negligent in his inspection of the land.

The appropriation of this land for the operation of the sewer plant of the defendant was made, but only so long as the plant was used as constructed. Since the defendant acquired the right to run the sewer effluent from the plant then in operation, if the plant is enlarged or put to any other use, then the plaintiff would be entitled to any damage he might sustain by reason of the enlargement or the improper use of the plant, which is the finding of the trial court and which finding we think is correct.

In the light of these observations, we conclude that the judgment of the district court should be affirmed.

AFFIRMED.

ELMER SHAMBERG, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
116 N. W. 2d 18

Filed July 6, 1962. No. 35191.

1. **Municipal Corporations.** Courts should give to language in city ordinances its plain and ordinary meaning.
2. **Statutes.** The distinction between a remedial and penal statute necessarily lies in the fact that the latter is prosecuted for the sole purpose of punishment, and to deter others from offending in like manner.
3. ———. A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed as modified.

Ralph D. Nelson, Henry L. Holst, and Hal B. Hasselbalch, for appellants.

Ginsburg, Rosenberg & Ginsburg and Norman M. Krivosha, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SIMMONS, C. J.

Plaintiff brought this action for a declaratory judgment, an injunction, and equitable relief. The defendants are the City of Lincoln and its officers who are charged with the enforcement of its ordinances. The action was tried in the district court and resulted in findings and a judgment for plaintiff. Defendants appeal. We find for the plaintiff on the particular issue presented and direct an injunction.

The facts involved are not in dispute.

Plaintiff is a homeowner on South Fifty-sixth Street in Lincoln. His land slopes to the east. By excavation on the rear of the land, plaintiff built a standard size tennis court. He put up the standard 10-foot-high backstops and sidestops which are near the borders of his land on the east and the south. The backstops and sidestops are of meshed wire supported by iron posts and braces.

Before erecting the court and the stops, plaintiff secured the verbal approval of the city's building inspector's office to the effect that the city did not issue building permits for tennis courts.

The particular provision involved is section 2107, of ordinance No. 5636, of the City of Lincoln, Nebraska, which provides that: "No fence shall be erected to a height to exceed six feet, * * *." The above is but a part of one sentence out of one division of one group of provisions in what the city advises us is "a long, complex ordinance."

It appears that the backstops and sidestops affected the aesthetic sensibilities of plaintiff's neighbor to the east. Apparently, because of that complaint, the city's building inspector required reduction in the height of the stops from 10 feet to 6 feet. The building inspector measured from the ground level of the court to the

top of the stops and thereby found a violation of the 6-foot limit of the ordinance. Plaintiff, measuring from the grade level in front of his property, found the height to be well within the 6-foot limit.

The city elected to enforce its ordinance by misdemeanor proceedings in municipal court. For several days it apparently threatened, if it did not actually do so, to file a separate complaint for each day that the plaintiff did not comply with its construction of the section and remove the offending 4 feet of the stops.

The trial court made extensive findings and found that plaintiff's backstops and sidestops did not constitute any violation of section 2107 of ordinance No. 5636 and enjoined the defendants from prosecuting any action or actions against the plaintiff for the recovery of penalties under the ordinances of the city.

Defendants here complain that the judgment of the trial court was in error in finding that the tennis court's backstops and sidestops had no reasonable relation to public health, welfare, or safety; in not finding section 2107 was constitutional or was unconstitutional; in not finding that the backstops and sidestops were "a fence more than six feet high"; and in finding that they did not constitute a violation of ordinance No. 5636 of the city of Lincoln.

The broad sweep of the trial court's judgment is understandable in the light of the fact that the city apparently elected to prosecute for a violation of ordinance No. 5636 without limiting or pointing to the section above-quoted. However, the issue tried and decided was that of the applicability of section 2107 to plaintiff's tennis court backstops and sidestops.

We are urged to determine questions of constitutionality and a variety of other matters. At the beginning, we are confronted with the question, are the backstops and sidestops a "fence"? The ordinance does not undertake to define the term directly, so far as we are advised, and the entire ordinance is not before us.

We held in Foote v. County of Adams, 163 Neb. 406, 80 N. W. 2d 179, that: "Courts should give to statutory language its plain and ordinary meaning."

The same rule applies to a city ordinance.

What then is the plain and ordinary meaning of the word "fence" as used in the ordinance?

The word is defined in 36A C. J. S., Fences, § 1, p. 258: "A fence is an inclosing structure, composed of any material which will present a sufficient obstruction, about a field or other space intended to prevent intrusion from without or straying from within."

It is hardly to be said that a tennis ball is something "straying from within" although the purpose of the backstops and sidestops is to keep a tennis ball within the playing area. Substantially the same definition is found in 22 Am. Jur., Fences, § 2, p. 513, and in Webster's Unabridged Dictionary (2d Ed.), p. 674.

How did the city in the ordinance construe the term so far as tennis court "backstops" are concerned? In section 209 of ordinance No. 5636 of the City of Lincoln, it provided that a building was "any structure," etc. In section 246, it provided that a structure included "backstops for tennis courts," and in the same area here involved, it provided that no building should exceed 35 feet in height. Obviously, the city in enacting the ordinance did not consider a tennis court backstop to be a fence within the meaning of the ordinance but a structure subject to the code height for a building. Just as obviously, the plaintiff has not violated that provision. The city then, in section 2605, provided that anyone violating the code was guilty of a misdemeanor, with each day the violation existed constituting a separate offense.

We have held: "The distinction between a remedial and penal statute necessarily lies in the fact that the latter is prosecuted for the sole purpose of punishment, and to deter others from offending in like manner. A remedial statute, of course, is for the purpose of adjust-

ing the rights of the parties as between themselves in respect to the wrong alleged." School District of the City of Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24.

We have also held: "A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions." Johnson Fruit Co. v. Story, 171 Neb. 310, 106 N. W. 2d 182.

It is not necessary to determine questions of constitutionality and other matters assigned.

We hold that plaintiff's structure is not a violation of the particular code provision here discussed and that defendants should be enjoined from enforcing or attempting to enforce the code provision against the plaintiff. The injunction should be so limited. Because of the particular language of finding and scope in the judgment, we modify the judgment of the trial court in accord with this opinion.

All costs are taxed to the defendant city.

AFFIRMED AS MODIFIED.

OMAR L. SEYMOUR, APPELLANT, V. JOURNAL-STAR PRINTING COMPANY, A CORPORATION, ET AL., APPELLEES.
116 N. W. 2d 297

Filed July 6, 1962. No. 35222.

1. **Workmen's Compensation: Appeal and Error.** An appeal in a workmen's compensation case is considered and determined de novo on the record in the Supreme Court.
2. **Workmen's Compensation.** A compensable injury within the meaning of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.
3. ———. An accident within the meaning of the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.
4. ———. The burden of proof is on the claimant in a work-

men's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.

5. ———. Exertion which is no greater than that ordinarily incident to the employment cannot of itself constitute an accident and, if combined with preexisting disease such exertion produces disability, it does not constitute a compensable accidental injury.

6. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.

7. ———. The former decision of this court in Orchard & Wilhelm Co. v. Petersen, 127 Neb. 476, 256 N. W. 37, that in an action under the Workmen's Compensation Act, the report of an injury to an employee made by the employer may be introduced in evidence as an admission against interest, and in the absence of other evidence may, under the conditions, be sufficient to make a prima facie case for the claimant, is overruled.

8. Workmen's Compensation: Limitations of Actions. By the terms of statute controlling in this case as conditions precedent to the maintenance of action, the plaintiff was required to give notice in writing as soon as practical after the accident, make a claim for compensation within 6 months, and commence action within 1 year.

9. ———: ———. In case of latent injury, the time for commencement of action is extended to 1 year after the employee obtained knowledge that the accident caused compensable disability.

10. ———: ———. The limitation of the statute relates to the time when compensable disability became known, and not when the full extent of the disability was ascertained.

Appeal from the district court for Lancaster County: PAUL W. WHITE, Judge. Affirmed.

Robert V. Hoagland, for appellant.

Cline, Williams, Wright, Johnson, Oldfather & Thompson, for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

YEAGER, J.

This is an action originally instituted by Omar L.

Seymour, plaintiff and appellant, in the Nebraska Workmen's Compensation Court, against the Journal-Star Printing Company, a corporation, and Globe Indemnity Company, a corporation, defendants and appellees, to recover workmen's compensation and other benefits recoverable under the workmen's compensation law, on account of alleged injuries which the plaintiff asserts that he sustained which flowed from an accident which occurred while he was employed by the defendant Journal-Star Printing Company.

The action was tried in the workmen's compensation court in which court the judgment was in favor of defendants and against the plaintiff. An appeal was taken to the district court where a like judgment was rendered. From this judgment an appeal was taken to this court. By stipulation of the parties the case comes to this court for consideration on the transcript of the proceedings of the workmen's compensation court, which transcript it was stipulated should be treated here as a bill of exceptions.

It follows therefore that the case is to be considered de novo on the record which is the transcript referred to in the stipulation. The following appears in Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379: "An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record."

In Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394, this court set forth criteria to be regarded in the determination of whether or not an accident has been proved and a right of recovery has been established within the meaning of the workmen's compensation law, as follows:

"A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.

"An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening

suddenly and violently and producing at the time objective symptoms of injury.

"In order to recover, the burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.

"Mere exertion, which is no greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability, it does not constitute a compensable accidental injury.

"An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence." See, also, Feagins v. Carver, *supra;* Murray v. National Gypsum Co., 160 Neb. 463, 70 N. W. 2d 394.

There are two major questions to be considered in this case. The first of these is that of whether or not the plaintiff has proved that he had an accident and a compensable injury within the meaning of the criteria set out.

The other is that of whether or not, if he did have such an accident and injury, he is barred of a recovery by lapse of time under limitations contained in the statute. These will be considered in the order stated.

For the further purposes of this opinion Seymour will be referred to as plaintiff and, since no reference to Globe Indemnity Company will be required in the discussion, when defendant is used the reference will be to the Journal-Star Printing Company.

The bill of exceptions contains no testimony adduced by the defendant. It follows of course that no testimony on behalf of the plaintiff was denied except as it stands denied by pleading. The insistence of the defendant is that the evidence of plaintiff falls short of proof by a preponderance, and particularly that he suffered an acci-

dent within the meaning of the workmen's compensation law.

In support of his claim the plaintiff testified that he was first employed by the defendant in June or July 1950, in work which was in part mental and in part physical; that this employment was continuous for about 6 years; that the physical part was extremely strenuous; that up to February 22, 1956, he was never off duty on account of back injury or difficulty; that at 7 p.m. his first job was to prepare and label sacks, placing the sacks on steel trucks at heights from 10 inches off the floor to shoulder high, and thereafter placing them on the dock for delivery to the terminal; that the sacks can weigh up to 100 pounds; that this is a daily operation and continues rapidly for from 1 to 1½ hours; that the work is heavier on 1 day of each week; that on this day he knew something happened and knew that he was uncomfortable, a fact which he communicated to two persons he worked with; that he did not know what happened, or when, whatever it was did happen; that he was aware of the feeling the rest of that night; that he continued his work until quitting time at 3:30 a.m.; that the next 2 days were days off and he also took the next 2 days off; that on Monday he consulted Dr. Roland F. Mueller who examined him, gave him a shot of fluid for muscle spasm, and prescribed physical therapy and a brace; that he was off work 7 or 8 days, after which he returned to work wearing the brace; that he reported the incident to the defendant; that he returned to work in March and continued to September 7, 1956; that he was wearing the brace at the time; that thereafter he worked for the Omaha World-Herald for 3 or 4 months in a similar capacity; that in 1957 he worked in this capacity at Denver; that during this entire period he was wearing the brace; that thereafter he continued to bear a brace; that during June of the year 1958, he came under the care of Dr. Philip E. Getscher; that physical therapy treatments were given in June and July, to which he

responded on a temporary basis but on discontinuance the symptoms would immediately return; that the true condition was revealed on December 10 or 11, 1959, and he went into surgery December 12, 1959; and that during the time from February 22, 1956, to June 1958, and thereafter, he to his own knowledge and belief suffered from what he said occurred on February 22, 1956.

One William D. Lehr, a fellow employee of the plaintiff, was called as a witness on his behalf. He gave the only testimony which appears in the record relating directly to the incident of the alleged accident. He testified only that Seymour complained that his back was hurt.

Dr. Roland F. Mueller testified as a witness on behalf of the plaintiff. This witness also, on January 16, 1960, made a report relating to the alleged accident, examination and treatment of the plaintiff, his diagnosis, his findings, and his opinion as to cause. This report is a part of the record, having been received without objection. To the extent of importance here this report and his testimony are in accord.

This testimony and this report disclose that on February 27, 1956, the witness examined the plaintiff at which time plaintiff related to him the incident which occurred on February 22, 1956; that he found considerable spasm present in the back muscles, some indication of slight nerve root radiation pain to the right side with slight difficulty in extending the right leg on the pelvis, and tenderness about the lumbosacral area of the back; that he advised moist heat, complete rest from work for several days, and physiotherapeutic treatment by massage and heat; that the physiotherapeutic treatment was continued from February 28, to March 3, 1956, inclusive; that on February 27, 1956, plaintiff was given an injection to relax muscle spasm; that he was advised to return to work on March 5, 1956; that he was also advised to have a back support fitted, which was done; that he was discharged on April 7, 1956, at which time

his back was almost normal although he was working with the back support; that the next time the witness saw him was on May 20, 1958, at which time he had a typical right sciatic nerve pressure syndrome, some loss of normal lumbar curve of the spine, there was only 50 percent of straight leg raising present, and reflexes were difficult to elicit; and that at that time it appeared that he had a disc syndrome with nerve root pressure.

This witness at this time informed the plaintiff as to the diagnosis of the condition which he found and directed him to Dr. Getscher, a specialist in the field of orthopedic surgery, who first examined him on June 7, 1958. In his testimony Dr. Mueller testified that, on the basis of the history given by the plaintiff, the injury was an "occupational injury," and that it was an accidental injury sustained "when he lifted that mail sack that he told me about."

Dr. Getscher testified as a witness in the case and, like Dr. Mueller, made a report which is a part of the record. Likewise, to the extent of importance here, it is in accord with his testimony. The report was made on March 7, 1960. The report in pertinent part contains a résumé of his testimony.

In the statement he pointed out that at the time the plaintiff became a patient of his he gave a history of what occurred on February 22, 1956, with information that he had been treated by Dr. Mueller and received moderate relief from pain in the lower back and in the right lower extremity, and he continued to have "periodic episodes of low back pain and sciatica on the right up until the time of my examination." In the statement it is pointed out that the first examination revealed that there was a ½ inch atrophy of the right thigh with muscle weakness and other infirmities not necessary to set out in detail here; that at this time the condition was tentatively diagnosed as a condition due to a ruptured intervertebral disc at the fifth lumbar interspace on the right side; that at that time it was recommended

that he receive additional physical therapy and intermittent traction to the lower back; that as a result of this treatment there was moderate improvement; that from the results of examinations made on November 30, 1959, and thereafter, plaintiff was caused to enter a hospital on December 11, 1959, where other studies were carried out which revealed a "herniated intervertebral disc at L5 on the right side"; and that on December 12, 1959, surgery was performed and the disc was removed. Recovery was very satisfactory and he was dismissed on December 20, 1959. This witness gave it as his opinion that after recovery from surgery the plaintiff would have a permanent disability of the body as a whole of approximately 10 to 15 percent.

From the evidence as summarized must flow the answer to the first question, namely, that of whether or not, within the definitions of law, the plaintiff has sufficiently proved by a preponderance of the evidence that he suffered an accident.

The rule that there must be proof of an accident is not satisfied by proof of probabilities or possibilities. It must, as has been pointed out, be established by competent evidence.

In this case there has been no evidence adduced in proof that, within the meaning of the workmen's compensation law, the plaintiff sustained an accidental injury. He is the only witness who gave testimony as to what occurred on February 22, 1956. The true effect of his testimony was to say that he did not know. He could say only that in the performance of the same kind of work performed in the same manner over a period of years he felt pain after which he lost a few days of time. There is no dispute about this.

It is true that two doctors testified on his behalf and gave it as their opinion that he suffered an accident. This however was based on history given them by the plaintiff which history was not different in any material respect from the evidence which came from the plaintiff.

It is urged that the testimony of the plaintiff satisfies the rules as to proof of an accident within the meaning of the decisions of this court. Reliance for this is placed on a comparison of the recitals here to the recitals contained in the opinion in Meierjurgen v. City of Lincoln, 132 Neb. 896, 273 N. W. 804.

If a comparison of these recitals could be said to have controlling significance, it could well be said that there is merit to the contention of the plaintiff in this respect. This however may not be done. The question of whether or not an accident had been proved was not, according to the opinion, presented there for determination. The opinion in that case makes this clear. It states: "The only question presented is one of fact, whether or not the disability results from an injury to the workman."

The plaintiff apparently seeks to avoid the operation of the legal rule to which reference has been made by, in substance, urging that the defendant, having adduced no evidence, may not be heard to assert that an accident was not proved. He relies on a rule stated in Orchard & Wilhelm Co. v. Petersen, 127 Neb. 476, 256 N. W. 37, as follows: "In action under compensation law, report of an injury to employee made by employer to the compensation commissioner may be introduced in evidence as an admission against interest of the employer, as to how, when and where the injury occurred, and, in the absence of other evidence, may be sufficient to make a prima facie case for claimant." In the case here the record discloses that the defendant, a short time after February 22, 1956, did so report and pay a small amount of compensation and another amount for medical services.

In the opinion however it is stated: "We think it may be conceded that such a report, in this state, may be sufficient to make a prima facie case, and, if there were no other evidence upon the subject, such a report may be sufficient to sustain a finding for the claimant. However, in this case, there is other evidence which tends to

discredit the facts recited in the report."

In the case here there was a denial of an accident and the evidence of the plaintiff was, within the controlling principles, insufficient as proof of an accident, and for this reason it must be said that the district court properly decided that the plaintiff was not entitled to an award of workmen's compensation.

In any event this rule, in the light of other matters of controlling significance which are pointed out herein, is of no moment in the determination of this case. Further the rule does not appear to be based on a sound approach to a consideration of the probative value of evidence, in consequence of which it ought, for the future, to be rejected. It is therefore overruled.

If it should be said that the plaintiff had proved an accident, there is another and controlling basis for denying any obligation. The reason is that, assuming that an accident and injuries were proved, notice of an accident and commencement of action did not occur within the limits of time provided by statute.

This case is controlled by sections 48-133 and 48-137, R. R. S. 1943. The sections were amended in 1961 by what is now referred to as sections 48-133 and 48-137, R. S. Supp., 1961, but the amendment requires no further reference here. By section 48-133, R. R. S. 1943, it is provided, in particulars applicable here, that the plaintiff could not maintain an action for compensation unless the plaintiff gave notice in writing as soon as practical after the accident, and unless a claim for compensation was made within 6 months.

By the decisions of this court it is held that if the employer had actual notice of the accident notice provided for by the statute was not required. See, Perkins v. Young, 133 Neb. 234, 274 N. W. 596; Krajeski v. Beem, 157 Neb. 586, 60 N. W. 2d 651.

The uniform holding of this court is that the failure to give notice of claim for compensation within 6 months is not a defense if the employee's accidental injury is

latent and progressive, and cannot with reasonable certainty be recognized at first as compensable. The applicable rule is that notice of claim given within 6 months from the time the employee acquires knowledge of a compensable disability as a result of the accident is sufficient under the statute. See, Flesch v. Phillips Petroleum Co., 124 Neb. 1, 244 N. W. 925; McCoy v. Gooch Milling & Elevator Co., 156 Neb. 95, 54 N. W. 2d 373; Webb v. Consumers Cooperative Assn., 171 Neb. 758, 107 N. W. 2d 737; Plambeck v. Natkin & Co., 171 Neb. 774, 107 N. W. 2d 734.

By section 48-137, R. R. S. 1943, it is provided that in case of personal injury, all claims for compensation shall be forever barred unless, within 1 year after an accident, the parties shall have agreed upon the compensation payable under the act, or unless, within 1 year after the accident, one of the parties shall have filed a petition for the purpose of having a claim for compensation adjudicated by the workmen's compensation court.

The limitation of this provision does not become applicable and under it compensation will not be denied if the injury was latent and did not result in compensable disability until after the time for commencing action, but it does become applicable after the expiration of 1 year from the time the employee has knowledge that the accident has caused a compensable disability. See, Plambeck v. Natkin & Co., *supra;* Webb v. Consumers Cooperative Assn., *supra.*

As has been pointed out the alleged accident with injury occurred on February 22, 1956. From the evidence it appears that the defendant had early notice of it. There must have been a claim for compensation within 6 months since compensation in the amount of $17.14 was paid on April 11, 1956, and $71 was paid on account of the occurrence not later than May 2, 1956. There is no other evidence of contact of the plaintiff or anyone on his behalf with anyone representing the defendant until this action was commenced in the

workmen's compensation court on April 25, 1960, and particularly there was no notice of injury and no claim for compensation.

The plaintiff was under the observation and treatment of Dr. Mueller from February 27, 1956, through April 7, 1956, on account of a strained back, considerable spasm of back muscles, slight nerve root radiation pain, and tenderness in the lumbosacral area, which according to the history recited by the doctor flowed from lifting a mail sack. It is apparent that the information as to his condition was made known to the plaintiff by the doctor. The plaintiff continued to work thereafter, for a time for the defendant, and then for other employers, until May 20, 1958, when he again consulted Dr. Mueller. In the interim he had continued to use a brace for his back. At no time during this period did the plaintiff make claim for or commence action to recover further compensation.

On May 20, 1958, when the plaintiff again consulted Dr. Mueller the doctor found a typical sciatic nerve pressure syndrome and some loss of lumbar curve of the spine with only 50 percent of leg-raising ability. At that time Dr. Mueller referred him to Dr. Getscher for orthopedic consultation.

On June 7, 1958, based on examination and history, Dr. Getscher diagnosed the condition substantially as it had been diagnosed by Dr. Mueller in 1956, except that he made a finding that there was a ruptured or herniated intervertebral disc. This examination and diagnosis was followed by the application of hot packs, massage, intermittent traction, and physical therapy. On December 12, 1959, an operation was performed and a herniated disc was found and removed. There was no evidence of other findings of disability except that attending the herniated disc.

The plaintiff continued to work obviously with knowledge of the diagnosis of Dr. Getscher made in June of

1958, without making claim or commencing action until April 25, 1960.

The date of the alleged accident and injury is certain and it is also certain that no notice of any kind or character was given prior to April 25, 1960. There may be some doubt as to whether or not the claimed condition was, within the meaning of law, latent up to June 7, 1958. There can however be no doubt about this after that date. The plaintiff's doctor and the plaintiff himself were informed from that time on that he was suffering from the results of a herniated disc which, if it flowed from an accident, was a compensable injury, but the plaintiff took no steps by notice or action until more than 1 year after the acquisition of that knowledge.

The plaintiff urges in substance that the bar of the statute as applied under the rule does not become effective until the total of the condition becomes known. This is not a correct interpretation of the law. Knowledge that there is a compensable disability, and not the full extent thereof, is the thing which controls. See, Dryden v. Omaha Steel Works, 148 Neb. 1, 26 N. W. 2d 293; McCoy v. Gooch Milling & Elevator Co., *supra;* Bame v. Lipsett, Inc., 172 Neb. 623, 111 N. W. 2d 380.

Not having taken the action necessary to permit him to obtain workmen's compensation the plaintiff may not be allowed to recover in this action.

The judgment of the district court is affirmed.

AFFIRMED.

EUGENE E. CULLINANE, APPELLEE, V. MILDER OIL CO., A CORPORATION, ET AL., APPELLANTS, IMPLEADED WITH RICHARD KNUDSEN, DOING BUSINESS AS CONCRETE FORM CO., APPELLEE.

116 N. W. 2d 25

Filed July 6, 1962. No. 35225.

1. **Trial: Juries.** It is the province of the jury to harmonize the

testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses.

2. Trial. Triers of fact have the right to test the credibility of witnesses and to weigh their undisputed parol testimony against the facts and circumstances in evidence from which a conclusion may properly be drawn that the witness was mistaken.
3. Negligence: Trial. In a case where, under the law and facts, the submission of the issue of contributory negligence and a comparison thereof with negligence of the opposing party to ascertain what damages, if any, shall be allowed is proper, the determination of the amount of damages is for the jury.
4. Trial. Where a party has sustained the burden and expense of a trial, and has succeeded in securing the verdict of a jury on facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Reversed and remanded with directions.

Cassem, Tierney, Adams & Henatsch and Morris J. Bruckner, for appellants.

A. A. Fiedler and Spielhagen, Matejka & Spielhagen, for appellee Cullinane.

Story, Pilcher, Howard & Hickman, for appellee Knudsen.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This was an action brought in the district court for Douglas County, Nebraska, for personal injuries sustained by the plaintiff and appellee Eugene E. Cullinane, in a collision between an automobile driven by the plaintiff and a truck operated by the defendant Donald E. Pettit while on the business of his employer, the defendant Milder Oil Company, a corporation, which was the owner thereof. These two defendants are the appellants herein. Richard Knudsen, doing business as Concrete Form Company, was the employer of the

plaintiff. He filed an answer asking subrogation to any judgment recovered by the plaintiff because of compensation paid to him under the Nebraska Workman's Compensation Act. He will not be referred to again. The other parties will be designated herein as they were in the trial court.

The trial resulted in a verdict for the plaintiff in the sum of $2,000. The plaintiff filed a motion for new trial which the trial court sustained. From the ruling granting the new trial the defendants have appealed to this court.

The pleadings of the parties adequately presented the defendants' negligence and the plaintiff's contributory negligence. Both issues were submitted to the jury under the instructions of the trial court. No objection to the instructions regarding the submission of the issues, or otherwise, is made by either party.

No reason was assigned by the trial court for setting aside the verdict and granting a new trial. Both parties have properly assumed the burden of assisting this court to a correct determination of the question presented. Biggs v. Gottsch, 173 Neb. 15, 112 N. W. 2d 396. In their briefs they agree that the trial court's ruling was premised on its belief that the verdict was so inadequate as to require a new trial. Plaintiff contends the trial court was correct in its ruling. The defendants maintain the verdict returned was within the discretion of the jury under the evidence and should not have been disturbed. The only question before us therefore is whether the verdict was so inadequate that the trial court could in its discretion set it aside.

The accident in which the plaintiff was injured occurred in the city of Omaha on March 14, 1959. He was taken in an ambulance to the Douglas County Hospital from the scene of the collision. There he was attended by his family doctor Joseph P. Drozda. The doctor testified the plaintiff had suffered severe head injuries and injuries to his right shoulder, cervical spine, lumbar

spine, and both legs. On the scalp there was a laceration extending from the forehead over the top to the back of the head. Sutures taken in his head wounds were long and large, the edges of the wounds being wide-spread with the skull protruding. Severe pain resulted in manipulation of the right shoulder and right knee and hip. X-rays taken of the skull and right shoulder disclosed no evidence of trauma or injury. There was a severe contusion of the right eye with hemorrhage under the skin and beneath the eyeball itself, making the eye appear a mass of blood. The patient was given medication for relief of pain, tetanus antitoxin, and antibiotics to counteract infection.

On March 15, 1959, he was transferred to St. Joseph's Hospital from which he was discharged on March 18, 1959. X-rays taken of the skull and the cervical spine disclosed no evidence of fractures or dislocations. While there antibiotics and medication to relieve pain and swelling from the wounds were continued. On the average of once a week until May 27, 1959, he called at the doctor's office where his wounds were dressed and the sutures removed. The cervical spine was given physical therapy in the form of ultra-sound. A Lewin collar made of a roll of bandage-type tissue was made to be wrapped about the neck, which could be worn, taken off at intervals, and re-applied by the patient. It was last worn on April 16, 1959. Medication for relief of muscle spasm was administered during the whole of this period but drugs for pain were gradually taken from him. On May 27, 1959, the patient told the doctor he was feeling well until he attempted to play ball with the children at which time his headaches and soreness in the neck were aggravated. In general he then stated he was getting along quite well. The weekly visits were discontinued on May 27, 1959, at which time the doctor stated the patient was relatively free from symptoms referable to his cervical spine injury. His head was completely healed, including the eye, although he ex-

perienced some headaches at infrequent intervals, and there were then no complaints with reference to the back.

On July 13, 1959, defendant again went to the doctor's office. He complained of pain in his hip which was very pronounced on motion, and of pain in his neck on manipulation. There was however no definite swelling. The tests made disclosed marked spasm, with pain radiating to his right foot. He was treated at the office for these complaints on July 13, 16, and 31, and on August 8 and 12, 1959. Medication was given to relieve the pain. He was given Endegia regularly applied by needle to the hip to stimulate healing and the reaction of bodily resistance to inflammation. The patient had an appointment elsewhere on August 14, 1959, and did not see the doctor that day because of it. He had been discharged on August 12, 1959, at which time the doctor stated he was relatively free of the symptoms of which he complained.

The plaintiff was not seen again by the doctor until January 25, 1960. His complaint was severe pain from the lower portion of his back radiating into the right foot and leg. The doctor found tenderness over the lumbar region in the small of the back. Leg-extension exercises elicited great pain along the course of the right sciatic nerve. There was diminished sensation in the sole of his right foot extending to the right fifth toe. He was given diathermy and medication for pain for muscle relaxes and was placed in traction at the doctor's office to help relieve the pressure on the spine. A pelvic traction apparatus was procured for home use, consisting of a girdle-type harness with straps running down the sides of each leg with ropes passing through a pulley to weights attached. He used this in bed at home and the doctor said he thought he would sleep in it at night. Six calls to the doctor's office were made between January 25 and April 11, 1960. On the latter day the treatment ended and the doctor testified the

plaintiff said at that time he was feeling better. There was then no diminished sensation in the foot. All nerve symptoms had disappeared. There was some soreness in the right hip which was the only finding at that time referable to his injury.

On September 26, 1961, the day before the trial, he was examined for the last time. The examination disclosed that leg-extension exercises were fully accomplished without pain, the right ankle reflex was sluggish, and there was neither lack of sensation nor aggravated sensitivity in any area. Leg measurement was equal, indicating no shrinking or atrophy of the leg. He walked with a good steady gait and complained of no symptoms except when he tried to do heavy work. On cross-examination the doctor testified he found nothing essentially wrong with the patient on this examination.

The doctor concluded from all his examinations and treatment that plaintiff's injuries were lacerations of the scalp, strain of cervical spine, contusion of right shoulder and both legs, lumbosacral sprain, with herniated disc in the lumbosacral area, which is the lower portion of the back. He gave it also as his conclusion that nerves which caused the lack of sensation in his fifth toe came from the first sacral nerve which had been injured, bruised, or compressed in the area between the fifth lumbar and first sacral vertebrae. The doctor, when asked to give his opinion as to whether plaintiff was suffering from any permanent disability, answered, "I think that Mr. Cullinane has had a — any permanent impairment, which would only be involved to the disc syndrome which would give him about five percent disability."

With respect to his working the doctor testified that according to his knowledge he wasn't able to work from the date of the accident to September 4, 1959, or from January 25 to April 11, 1960, but that he worked from September 4, 1959, until January 25, 1960. The patient

canceled an appointment with the doctor on September 4, 1960, because he was working at the Capehart project.

The plaintiff testified on his own behalf. At the time of the accident on March 14, 1959, he was regularly employed by Knudsen Construction, branch of the Concrete Form Company, as a supervisor. He received $100 a week and a bonus. Plaintiff was 35 years of age and had an expectancy of 32.59 years. He stated he was unable to return to work after the accident until the middle of the following August. After 2 weeks he stopped working and stated it was because he could not take a full day for one thing, and had headaches bothering him. After being idle 2 weeks, in which he looked for other type of work but failed to find it, he went into business for himself on about October 1, 1959. For this purpose he incorporated. His new business was construction work. It was the same type of business in which he was formerly employed. He was awarded a subcontract on the Capehart project at Offutt Airfield, which included all the masonry and concrete work on 216 units. Workmen were employed by him in the new business. The work was completed in January 1961. His compensation on the contract was $400,000. He testified he was in traction from the first part of January until the latter part of March 1960, and was unable to attend to business except for a short time when he had his employees come to his home to conduct his business. He stated he was out of work 4 or 5 months. He further stated that during the time of self employment he was home from January to April and that after the second week his business was at a standstill.

Plaintiff described the treatment quite briefly as the doctor had stated before. He testified he had scars on top of his head and from the right shoulder to the rib carriage. Plaintiff stated that from the time of the accident to August 1959, he was given treatments once or twice a week, depending upon the severity of the pain, and that he had headaches in the summer and fall of

1959; and that for a period of 4 months in 1960 he could not sleep and was under heavy medication because of severe pain. He was given therapy treatments by Dr. Paul Reichstadt about twice a week from June to August 1960, but there is nothing in the record to disclose what these were about. At the time of trial, on weather changes he stiffened up, had pain, couldn't drive long distances because of shoulder pain, and suffered from occasional headaches. When asked if he could lift heavy objects in his work, he testified, "I haven't lifted anything much heavier than a pencil since this accident."

Plaintiff's doctor, hospital, and ambulance bills were introduced in evidence. They totaled $345.50.

Defendant did not introduce any testimony with respect to damages and that outlined is the only evidence concerning them.

The plaintiff's contention is that his expense of sickness was $346.50; that he lost 23 weeks' time from work which at $100 a week was $2,300, making $2,646.50 monetary loss; and that nothing was awarded by the jury for pain suffered, or for 5 percent permanent disability.

The court's instructions to the jury on damages submitted all of these items to the jury for its consideration. The plaintiff's theory seems to be that because the defendant introduced no evidence tending to disprove the damages as given in the plaintiff's evidence, that the several items in that evidence had to be given credence by the jury in the full amount claimed by plaintiff and his doctor. Further, that the jury could not have arrived at the amount of its verdict by a reduction thereof because of any contributory negligence it might have attributed to the plaintiff; that unless the negligence of the plaintiff was found to be slight in comparison with that of the defendant, it could not have found for the plaintiff at all; and that if plaintiff's negligence was slight in comparison with the defendant's negligence, the verdict under the law could have been reduced only slightly, and the $2,000 awarded would still be inade-

quate and not that which should have been rendered under the court's instructions.

The plaintiff was in the hospital 4 days in all. X-rays disclosed no fractures or dislocations, evidence of trauma, or injury to the skull. He was able to go to the doctor's office weekly. On three occasions he was discharged from his doctor's care, at which times the symptoms for which he had then been treated had disappeared and he was considered in reasonably good condition. At each recurrence of trouble his symptoms differed considerably. Though his doctor found a 5-percent permanent disability, he found nothing essentially wrong on his last examination. The time he was off work, as testified to by the plaintiff and his doctor, did not correspond completely, and the time he was searching for a new position and preparing for self-employment was not clearly distinguished.

Even though defendant introduced no evidence in regard to the plaintiff's damages, the jury as trier of the facts had before it matters in evidence from which different inferences could arise.

In Klein v. Wilson, 167 Neb. 779, 94 N. W. 2d 672, this court held: "It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses.

"Triers of fact have the right to test the credibility of witnesses and to weigh their undisputed parol testimony against the facts and circumstances in evidence from which a conclusion may properly be drawn that the witness was mistaken.

"In a case where, under the law and facts, the submission of the issue of contributory negligence and a comparison thereof with negligence of the opposing party to ascertain what damages, if any, shall be allowed is proper, the determination of the amount of damages is for the jury."

The jury was the sole judge of the facts presented by

the evidence. It found for the plaintiff but it had before it the task of considering the testimony of the witnesses and the credence to be placed upon it, and to reconcile it as best it could. It was not obliged to accept the plaintiff's or his doctor's testimony to the full extent of the damages claimed. It also had before it the question of the plaintiff's contributory negligence and the amount of damages the award could be reduced under the comparative negligence rule. Under such circumstances we do not feel a verdict of $2,000 is so inadequate as a matter of law that it should be set aside. Certainly it is not so inadequate as to indicate passion or prejudice.

" 'Where a party has sustained the burden and expense of a trial, and has succeeded in securing the verdict of a jury on facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.' " Biggs v. Gottsch, *supra*. See, also, Hert v. City Beverage Co., 167 Neb. 557, 94 N. W. 2d 27.

The plaintiff cites certain cases, where judgments on verdicts were held inadequate or were not in accord with the court's instructions that were set aside, which he considers decisive of this case. Olson v. Shellington, 162 Neb. 325, 75 N. W. 2d 709, was a case where a minor who was a guest in an automobile sued the driver of the car in which he rode. A judgment of $24,000 was recovered but the jury added to its verdict, "We find slight negligence on the part of the defendant." This was held inconsistent because the verdict against the host driver should not have been returned because of slight negligence. The case does not involve inadequate damage and is clearly not applicable. Dolen v. Beatrice Restaurant Co., 137 Neb. 247, 289 N. W. 336, is a case where the plaintiff fell down the stairs in the defendant's place of business. The doctor bills were $994, and the plaintiff was quite severely injured. No contributory negligence was involved. A verdict of $700 was held so inadequate as to indicate passion and prejudice. Harper v. Young, 139

Neb. 624, 298 N. W. 342, was a case where a rural mail carrier was injured while his car was standing still at a mail box. No contributory negligence was involved. The doctor, medical, hospital bills, and loss of time aggregated $1,721.96, and a verdict of $1,225.66, was likewise set aside. In the cited case, plaintiff had permanent injuries to the head, neck, and left shoulder. His arm and hand tissue was atrophied and there was a limitation of movement and loss of hearing involved. Ambrozi v. Fry, 158 Neb. 18, 62 N. W. 2d 259, and Schumacher v. Lang, 160 Neb. 43, 68 N. W. 2d 892, are both cases in which a guest sued the driver of the automobile in which the guest was not riding. Verdicts deemed inadequate were returned but on evidence clearly involving far greater damages and where no contributory negligence existed. These authorities cited by the plaintiff are all inapplicable to the case before us.

Undoubtedly there was sufficient evidence to sustain a higher verdict had it been returned. It is not however the province of this court to interfere with the verdict because its view of the evidence would warrant a greater one.

It follows that the judgment of the trial court setting aside the verdict and granting a new trial should be reversed and the cause remanded with directions to reinstate the verdict and enter judgment thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, ET AL., APPELLEES, V. FRONTIER AIRLINES, INC., A CORPORATION, APPELLANT.
116 N. W. 2d 281

Filed July 6, 1962. No. 35234.

1. **Contempt. The power to punish for contempt of court is a power inherent in courts of general jurisdiction such as the district courts of this state.**

2. ———. The Legislature has no power to limit or interfere with the inherent power of district courts to punish for contempt of court.
3. **Constitutional Law: Contempt.** A statute relating to the violation of an injunction proposing to limit punishment for contempt to a specific fine not exceeding $200 and providing that upon the default of payment thereof a person may be committed to close custody until he shall fully comply with the requirements of the statute or be otherwise legally discharged constitutes an attempt to infringe upon an essential attribute of the judicial department which has the inherent power to punish for contempt of court; held, to be an invalid statute.
4. ———: ———. Section 25-1072, R. R. S. 1943, held to be an invalid and unenforceable statute.

Appeal from the district court for Cherry County: ALBERT W. CRITES, Judge. Affirmed.

Marti, O'Gara, Dalton & Sheldon, for appellant.

Clarence A. H. Meyer, Attorney General, Homer G. Hamilton, and Rush C. Clarke, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The State of Nebraska ex rel. Clarence S. Beck, Attorney General, and the Department of Aeronautics of the State of Nebraska, plaintiffs, filed a petition in the district court for Cherry County, praying that a temporary injunction issue enjoining Frontier Airlines, Inc., a corporation, hereinafter referred to as the defendant, from abandoning its air transportation route between the cities of Chadron and Lincoln, Nebraska, and the intermediate cities of Valentine, Ainsworth, and Norfolk, Nebraska, and from discontinuing the intrastate transportation by air for hire over and along such route and between the several cities thereon.

The defendant is a corporation organized and existing under and by virtue of the laws of the State of Nevada, and engaged as a common carrier in the business of the

transportation by air of persons and property for hire in various states, including Nebraska.

The plaintiffs' petition contained an allegation as follows: That the public convenience and necessity require that such service be not abandoned or discontinued, but carried on and continued. The area now and heretofore served by defendant is wholly without railroad passenger service, without adequate bus service, and without other commercial surface transportation service of any kind. The cities of Ainsworth, Valentine, and Chadron and the trade areas surrounding them are isolated from the rest of the State of Nebraska, and particularly from the trade, medical, educational, and cultural centers at Lincoln and Omaha, Nebraska. The roads and highways in the area are often completely impassable during the winter months. The area is also without adequate service for the transportation of property. Defendant has been and now is providing the only commercial transportation in the area along the route above described, except for a completely inadequate bus service, and the abandonment and discontinuance by defendant of the service heretofore furnished by it over such route will cause great and irreparable harm and injury to the people of Nebraska generally and particularly to the people of the northern half of Nebraska.

The plaintiffs' petition was filed on August 29, 1960. On the same day a temporary injunction was granted as prayed for in the plaintiffs' petition.

On December 23, 1961, the Attorney General of the State of Nebraska moved the court for an order directing the issuance of a citation against the defendant to show cause why it should not be proceeded against and punished for contempt of court. In this motion for citation the plaintiffs alleged that the defendant did, on or about December 22, 1961, knowingly, willfully, contumaciously, contemptuously, and with unlawful intent openly and publicly flout, ignore, and disobey the order of the dis-

trict court as contained in the temporary injunction, refused to continue to obey it, and did abandon and discontinue all of the above described service and transportation.

The defendant made answer to the motion for citation, admitting the cessation of service, but disavowing any willful, contumacious, or contemptuous disobedience of the injunction order, and prayed that it be found not to be in contempt and that it be discharged from the citation issued therein.

On January 2, 1962, a consolidated hearing was held upon the citation for contempt and the defendant's motion for suspension of the temporary injunction. The trial court dissolved the injunction for the following reasons: The Civil Aeronautics Board rendered an order deleting segment 13, which included the route as set out in the plaintiffs' petition, from the certificate of public convenience and necessity authorizing air transportation by defendant over its intrastate system, which became effective December 19, 1961; the authority of the defendant to furnish air transportation over the route and to, from, and between the cities referred to in the petition, is regulated and determined according to the federal certification; and Chapter II, section 3.7, of the Rules and Regulations of the Nebraska State Railway Commission, does not prohibit defendant from abandoning and discontinuing all service over and upon the aforesaid route segment.

On January 2, 1962, the trial court adjudged the defendant guilty of contempt of court and ordered that the defendant pay a fine of $1,000 a day for each day, beginning on December 21, 1961, and up to but not including January 2, 1962, for violation of the injunction issued by the court on August 29, 1960.

The defendant perfected appeal to this court as provided for in section 25-1912, R. S. Supp., 1961.

The defendant assigns as error that the trial court was

without authority to impose a fine in excess of $200 against the defendant herein.

Section 25-1072, R. R. S. 1943, involved in this appeal, provides as follows: "An injunction granted by a judge may be enforced as the act of the court. Disobedience of an injunction may be punished as a contempt by the court, or by any judge who might have granted it in vacation. An attachment may be issued by the court or judge, upon being satisfied by affidavit of the breach of the injunction, against the party guilty of the same; and he may be required, in the discretion of the court or judge, to pay a fine not exceeding two hundred dollars, for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or, in default thereof, he may be committed to close custody, until he shall fully comply with such requirements, or be otherwise legally discharged."

Article V, section 9, of the Constitution of this state, provides in part that the district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide.

The defendant relies on Eicher v. Tinley, 221 Iowa 293, 264 N. W. 591, as the leading case supporting its position. In the cited case a petition in equity was filed by the street railway company asking that a temporary injunction be issued enjoining Eicher and other defendants from interfering with the operation of the plaintiff's street railway system in Council Bluffs. A temporary injunction was granted as prayed for by the plaintiff by a judge of the district court. A hearing was had and a judgment and order of the trial court was filed, finding Joseph Eicher guilty of violation of the injunction and in contempt of court. He was ordered to be confined in the county jail for 90 days, and ordered to pay a fine of $300, and in case such fine was not paid before the last day of the 90-day sentence, he was to be held for an additional 90 days to satisfy the payment of the fine. Eicher took his case to the Supreme Court of

Iowa, setting forth the grounds for reversal, one of which was that the trial court had no right or power to impose upon the petitioner any greater penalty than a $50 fine and 1 day in jail. The respondent contended that a proper construction of provisions of the Code in regard to contempts did not limit the court to a penalty fixed by section 12543 which provides that the punishment for contempts may be by fine or imprisonment, or both, but where not otherwise specially provided, courts of record are limited to a fine of $50, and an imprisonment not to exceed 1 day, and all other courts are limited to a fine of $10; that a contempt arising out of the violation of an injunction is controlled by section 12539 of the Code, which provides that if the court finds that a contempt has been committed it may "punish it in the usual mode"; that by the words "in the usual mode" is meant, not the mode provided in section 12543, but the mode which the courts have an inherent right to exercise; and that if the provisions of section 12543 were meant to apply to contempts arising out of violations of injunctions, then the provisions of section 12543 are unconstitutional. The court said: "As a ground for this contention, respondent argues that the district court of this state was not created by statute, but by section 1, article V, of the Constitution, which recites that 'The Judicial power shall be vested in a Supreme Court, District Courts, and such other Courts, inferior to the Supreme Court, as the General Assembly may, from time to time, establish'; that the district court, having thus derived its existence from the Constitution, having the inherent right to punish for contempts committed against it, and being a part of the separate and coordinate judicial department of the state, is entirely independent of the legislative branch; and that this inherent right to punish for contempts against it, which is possessed by the district court, cannot be abridged or taken away from it by legislative enactment." The court went on to say: "We think it must be conceded that the power to punish

for contempts is an inherent right possessed by the courts, and that this right cannot be taken away from a constitutional court by the legislature. The question still remains, however, Is a statute limiting the punishment for contempt that may be inflicted by a constitutional court such an interference or abridgement of the court's inherent right that it is beyond the power of the legislature to enact?" The court further said, quoting from Drady v. District Court of Polk County, 126 Iowa 345, 102 N. W. 115: " 'There is no ground upon which to plant the assertion that here was an attempt on the part of the legislature to deprive the courts of their inherent power; on the contrary, the aim was to provide regulations for the exercise thereof. This, according to the better weight of authority, it might do, and, as we think, to a certain extent it must do.' * * * We find nothing in the language of the chapter in regard to contempts arising out of the violations of injunctions that leads us to the conclusion that the punishment for such contempts is not subject to the limitation provided by section 12543 of the Code, and we hold that the provisions of that section are applicable to the facts of this case. We reach the conclusion, therefore, that, while the respondent was justified, under the facts presented at the hearing before him, in imposing a punishment for contempt, he was acting illegally when he imposed on petitioner the fine of $300 and sentenced him to imprisonment for 90 days. The penalty imposed by the respondent should not have exceeded a fine of $50 and imprisonment should not have exceeded one day in jail. In so far as the order of the respondent violates the statute limiting the fine and imprisonment which he might legally impose, it should therefore be modified."

The Iowa Supreme Court held: "While the general assembly has no power to wholly deprive a constitutionally created court of its inherent power to inflict punishment for acts which are in contempt of such court, yet it may constitutionally impose a reasonable limita-

tion on such courts as to the punishment which may be imposed." In other words, the Iowa Supreme Court said that the statute limiting the penalties for contempt was simply a legislative prescription of the manner in which the court's jurisdiction should be exercised, and was constitutional because it was specifically authorized by the Iowa Constitution. The Constitution of this state places no such limitation, as does the Iowa Constitution, upon the jurisdiction of the district courts of this state to punish for contempt of court for violation of an injunction.

We are not in accord with the holding in the case of Eicher v. Tinley, *supra*.

We deem the language used in Opinion of the Justices, 86 N. H. 597, 166 A. 640, applicable to the instant case. The court said: " 'It is said by Blackstone, that the process of an attachment for a contempt, must necessarily be as ancient as the laws themselves. For laws without a competent authority to secure their administration from disobedience and contempt, must be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such attempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every judicial tribunal.' Tenney's Case, 23 N. H. 162, 166.

" 'The authority to punish contempt is a necessary incident, inherent in the very organization of all legislative bodies, and of all courts of law or equity, independent of statute provisions.' State v. Matthews, 37 N. H. 450, 453. To the same effect is Bates's Case, 55 N. H. 325.

"The constitution confers upon the legislature 'full power and authority to erect and constitute judicatories and courts.' Const. Pt. II, art. 4. The question now presented is whether this grant of power is broad enough to authorize the legislature to take from the judicial department of the government a power which has always, both here and elsewhere, been recognized as an

essential attribute of judicial tribunals. We are of opinion that it does not confer such power. The existence of the judiciary as one of the three essential parts of government is declared in terms. It is 'to be kept as separate from, and independent of' the legislature 'as the nature of a free government will admit.' Const. Pt. I, art. 37. If one of the essential attributes might be taken away from the judiciary, so might many or all of them; and our courts might be directed to proceed in accordance with regulations at variance with all known ideas of the functions of a court. The constitution creates no such supremacy of the legislative department over the judicial. * * *

"As before pointed out, it is the law in this state that the power to punish for contempt is an essential attribute of a court of general jurisdiction. It may not be entirely clear whether the legislature can regulate the exercise of this power, beyond the limit of reasonable sentence of the offender, which is implicit in existing law. If there is such power, it is manifest that it does not extend to fixing a limit which in many cases would not provide for more than a nominal sentence. Such is the proposal in this bill. While this feature of it preserves the form of power, it takes away the substance thereof. It is our opinion that authority to enact such a limitation has not been conferred upon the legislature."

In the above case the court was considering a legislative bill, and stated: "A provision, however, proposing to limit all punishment for indirect contempt to a specific fine of one hundred dollars and imprisonment not to exceed fifteen days would be an unconstitutional attempt to infringe upon an essential attribute of the judicial department. * * * The separation of powers effected by the constitution in the creation of the three departments of government is a vital limitation upon powers and not merely a convenient and variable assignment of duties."

In Eicher v. Tinley, *supra*, the court in analyzing the

above-cited case stated that it holds that a legislative body cannot place any limitation upon the punishment to be inflicted for contempt by a constitutional court.

In considering the language in Opinion of the Justices, *supra,* we conclude that it does hold in effect that the legislative body cannot limit or interfere in the punishment of contempt by a constitutional court such as the district courts of this state, because of the inherent power vested in the district courts to punish for contempt.

The rule applicable in this state is that the power to punish for contempt of court is a power inherent in all courts of general jurisdiction, such as the district courts of this state, independent of any special or express grant of statute. See 12 Am. Jur., Contempt, § 40, p. 418. We adhere to this principle.

In the instant case the defendant raises no question as to the reasonableness of the fine, but bases its contention squarely upon the proposition that the Legislature may limit the punishment for contempt of an injunction as provided for by section 25-1072, R. R. S. 1943.

There is no bill of exceptions in this case, therefore we are unable to discern any factual situation that may have warranted the trial court in finding differently than it did. As heretofore stated, the contention of the defendant is that the fine in any event should not exceed $200.

As stated in 17 C. J. S., Contempt, § 100, p. 144: "* * * if a series of acts constitutes but one contempt, or the same contempt is permitted to continue for several days, there cannot be separate punishment for each successive act or day." Applying the above to the instant case, the fine of $12,000 assessed against the defendant is but one fine.

We conclude that section 25-1072, R. R. S. 1943, is an invalid statutory enactment and is unenforceable in the instant case.

We further conclude that the judgment of the trial court should be affirmed.

AFFIRMED.

RITA KNUTH, APPELLANT, V. BERNARD L. SINGER ET AL., APPELLEES.
116 N. W. 2d 291

Filed July 13, 1962. No. 35128.

1. **Automobiles.** The right to stop when the occasion demands is an incident to the right to travel.
2. **Appeal and Error.** A judgment will not be reversed for errors against a party not entitled to succeed in any event.
3. **Negligence.** Negligence is not actionable unless it is the proximate cause of injury.
4. ———. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the injury would not have occurred.
5. ———. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury.
6. ———. An alleged cause of an accident may be merely a condition and not the real cause. It is not sufficient if the negligence charged does nothing more than furnish a condition by which injury is made possible. If the condition causes injury through the subsequent independent act of a third person, the two acts are not concurrent, and the existence of the condition is not the proximate cause of the injury.
7. **Pleading: Trial.** A party may at any and all times invoke the language of his opponent's pleading, on which the case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner.

Appeal from the district court for Hall County: WILLIAM F. MANASIL, Judge. Affirmed.

John A. Wagoner, for appellant.

Luebs, Elson & Tracy, Richard A. Huebner, Walter P. Lauritsen, and Harold A. Prince, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, SPENCER, and BOSLAUGH, JJ., and CHADDERON, District Judge.

BOSLAUGH, J.

This is an appeal in an action for damages arising out of an automobile accident. The plaintiff, Rita Knuth, was a passenger in an automobile owned by Kenneth Bantam and operated by Richard Waldo at the time the accident occurred.

The accident happened at about 5 p. m., on March 23, 1956. It was a clear day, the sun was shining, and the pavement was dry. The accident occurred on U. S. Highway No. 34 approximately 3 miles west of Aurora, Nebraska. At that point the highway crosses a railroad right-of-way on an overpass. The entire overpass including both approaches is 3,000 feet long. The accident occurred near the west end of the overpass where there is a turnoff for a county road leading south from the highway. The turnoff is approximately 968 feet west of the center or highest point of the overpass. Near the turnoff the overpass is a two-lane highway and consists of concrete paving 20 feet wide constructed on an earth fill. There are shoulders 5 feet wide on each side of the pavement. A post and cable guard fence is located at the edge of each shoulder.

At the time the accident occurred the defendant, Ronald E. Oswald, was proceeding slowly or had stopped in the westbound lane just east of the turnoff near the west end of the overpass. Oswald was waiting for eastbound traffic to clear the intersection so that he could turn left onto the county road. The defendant, Sydney A. Diffendaffer, had been proceeding west behind the Oswald automobile and had stopped in the westbound lane of the highway just east of the Oswald automobile. The automobile operated by the defendant, Bernard L. Singer, and which was following the Diffendaffer automobile, collided with the Diffendaffer automobile. The plaintiff was injured when the Bantam automobile op-

erated by Waldo collided with the rear of the Singer automobile.

At the close of the plaintiff's evidence, the district court sustained the separate motions of the defendants Oswald and Diffendaffer for directed verdicts in their favor. The jury returned a verdict for the defendant Singer. The plaintiff's motion for new trial was overruled and she has appealed.

The assignments of error are that the trial court erred in directing a verdict for the defendant Oswald; in admitting evidence as to the speed of the Bantam automobile; in excluding admissions of the defendants Oswald and Singer; in giving certain instructions; and that the judgment is not supported by the evidence and is contrary to law. No error is assigned with respect to the direction of a verdict for the defendant Diffendaffer.

In determining whether the trial court was correct in directing a verdict for the defendant Oswald, all controverted facts must be resolved in favor of the plaintiff and she must have the benefit of every inference that can reasonably be deduced from the evidence. Lindelow v. Peter Kiewit Sons', Inc., *ante* p. 1, 115 N. W. 2d 776.

The amended petition alleged that the defendant Oswald was negligent in stopping his automobile suddenly, approximately 25 feet east of the turnoff, considering the nature and condition of the roadway and that the vision of westbound traffic crossing the overpass was restricted, and in failing to give a proper warning signal.

None of the persons riding in the Bantam automobile, including the plaintiff, testified as to the operation of the Oswald automobile. The defendant Diffendaffer, who was called as a witness by the plaintiff, testified that he saw the brake lights on the Oswald automobile, knew that it was either slowing down or stopped, and that he stopped approximately 8 feet behind the Oswald automobile. This was substantially the only evidence produced as to the operation of the Oswald automobile.

There was no evidence which would support a finding

that it was negligent for the defendant Oswald to stop in the westbound lane of traffic for the purpose of allowing traffic approaching from the west to clear the intersection so that he could turn left onto the county road. The right to stop when the occasion demands is an incident to the right to travel. Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669. See, also, Bauer v. Bahr, 240 Wis. 129, 2 N. W. 2d 698.

There is also no evidence that the defendant Oswald failed to give a proper warning signal of his intention to stop. The testimony of the defendant Diffendaffer, offered by the plaintiff, was that Diffendaffer saw the brake lights on the Oswald automobile.

Plaintiff offered part of a deposition of the defendant Oswald as admissions. This evidence was that the speed of the Oswald automobile was probably 15 or 20 miles per hour when it was 50 or 100 feet east of the turnoff; that the Oswald car never came to a complete stop on the overpass; that an eastbound automobile passed the Oswald car just before the defendant Oswald turned left onto the county road and that there were no other cars in the immediate vicinity approaching from the west at that time; that just before the defendant Oswald made the left turn he knew that there was another automobile about one car length behind him; and that after the defendant Oswald had started to turn left and was probably halfway around the corner, he heard the crash of the collision on the viaduct. This testimony did not tend to prove any negligence on the part of the defendant Oswald that the jury could have found was a proximate cause of the plaintiff's injuries.

There was a failure of proof as to any negligence on the part of the defendant Oswald that the jury could have found was a proximate cause of the plaintiff's injuries. Thus, it was proper for the trial court to direct a verdict for the defendant Oswald.

Before considering the remaining assignments of error,

there is a preliminary question which must be determined. The defendant Singer contends that there was no evidence of any negligence on his part that the jury could have found was a proximate cause of the plaintiff's injuries. If this contention is correct, the judgment must be affirmed. A judgment will not be reversed for errors against a party not entitled to succeed in any event. Muenchau v. Swarts, 170 Neb. 209, 102 N. W. 2d 129.

The amended petition alleges that as the Bantam automobile, in which the plaintiff was riding, reached the crest of the overpass, the defendant Singer's automobile collided with the Diffendaffer automobile; and that as a result of the collision with the Diffendaffer automobile, the Singer automobile was sitting in a diagonal position with the rear part across the centerline of the overpass roadway and the Singer automobile usurped the use of the roadway for the Bantam automobile. The amended petition further alleged that the defendant Singer was negligent in failing to maintain a proper lookout, particularly for the Diffendaffer automobile; in failing to maintain proper control over his automobile so as to be able to avoid a collision with the Diffendaffer automobile; in operating his automobile at a high and dangerous rate of speed; and in failing to drive his automobile within the range of his vision so as to be able to stop, turn aside, and avoid an accident, especially with the Diffendaffer automobile.

The allegations of negligence as to the defendant Singer consist basically of two charges of negligence. The plaintiff alleges that the Singer automobile collided with the Diffendaffer automobile because the defendant Singer operated it negligently, and that as a result of the collision the rear part of the Singer automobile projected into the eastbound lane of traffic and prevented the Bantam automobile from using the south lane of the highway.

The problem is one of proximate cause. Negligence

is not actionable unless it is the proximate cause of injury. Wagner v. Watson Bros. Transfer Co., 128 Neb. 535, 259 N. W. 373. Unless the alleged negligent operation of the Singer automobile and the resulting collision with the Diffendaffer automobile was a proximate cause of the later collision of the Bantam automobile with the Singer automobile, the plaintiff has no right of recovery as against Singer.

Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the injury would not have occurred. Cover v. Platte Valley Public Power & Irr. Dist., 173 Neb. 751, 115 N. W. 2d 133. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. Bramhall v. Adcock, 162 Neb. 198, 75 N. W. 2d 696. An alleged cause of an accident may be merely a condition and not the real cause. It is not sufficient if the negligence charged does nothing more than furnish a condition by which injury is made possible. If the condition causes injury through the subsequent independent act of a third person, the two acts are not concurrent, and the existence of the condition is not the proximate cause of the injury. Frerichs v. Eastern Nebraska Public Power Dist., 154 Neb. 777, 49 N. W. 2d 619.

The collision between the Singer automobile and the Diffendaffer automobile could not of itself be a proximate cause of the later collision of the Bantam automobile with the Singer automobile. If the Singer automobile had stopped behind the Diffendaffer automobile without colliding with it, the situation would have been the same so far as the Bantam automobile was concerned.

The other charge of negligence is that the rear part of the Singer automobile projected across the centerline of the highway and into the eastbound lane of traffic and prevented the Bantam automobile from using that

side of the highway. None of the witnesses testified as to how far the rear of the Singer automobile projected into the south lane of the highway. The evidence is that the Singer automobile was about 6½ feet wide. Kenneth Bantam testified that the Singer automobile seemed to have its left-hand wheels over on the south side of the road and the rear end "sticking over" the south side of the road; that the Singer automobile was right about on the centerline, about straddle of the centerline; and then the front end swung to the north just before it collided with the Diffendaffer automobile. Darlene Vosika, a passenger in the Bantam automobile, testified that she noticed that Waldo was turning to the left and applying the brakes as the Bantam automobile was going down the viaduct and that she glanced up and saw the rear of a car, the bumper part and the rear part, on the left-hand lane across the centerline. Waldo testified that immediately after the collision between the Singer automobile and the Diffendaffer automobile, the back end of the Singer automobile was across into the left-hand side of the road across the centerline. On cross-examination Waldo testified that he did not see the rear of the Diffendaffer automobile at the time the Singer automobile collided with it and that he supposed the impact occurred on the north half of the pavement or in the right lane.

Taking the view of the evidence most favorable to the plaintiff, it fails to show that the entire south lane and shoulder of the highway were blocked by the Singer automobile. At most only a part of the south lane was obstructed. The inference is that sufficient space remained to the south of the Singer automobile for the Bantam automobile to have passed to the left if it had been under control. So far as the use of the south lane of the highway is concerned, there is the further consideration of the eastbound automobile which passed the Oswald automobile just before the impact and the left turn made by Oswald onto the county road.

But if it is assumed that the rear of the Singer automobile projected into the south lane of the highway a sufficient distance to deny the Bantam automobile the use of the south lane and shoulder of the highway, that still was not the proximate cause of the plaintiff's injuries.

The plaintiff alleged that the Singer automobile collided with the Diffendaffer automobile when the Bantam automobile was at the crest of the overpass. This was a judicial admission that was binding on the plaintiff and it was a waiver of all controversy as to where the Bantam automobile was when the Singer automobile collided with the Diffendaffer automobile. Aye v. Gartner, 172 Neb. 162, 108 N. W. 2d 798. Thus, the plaintiff is not entitled to the benefit of any evidence which was contrary to her allegation.

Under the plaintiff's theory of the case as pleaded, the Bantam automobile traveled a distance of approximately 900 feet after the Singer automobile had collided with the Diffendaffer automobile, and before colliding with the Singer automobile. There was evidence that the turnoff near the west end of the overpass was not clearly visible to westbound traffic until it reached the center of the second section of the bridge. Therefore, the distance which the Bantam automobile had in which to stop was between 600 and 700 feet. Waldo testified that the speed of the Bantam automobile at the crest of the overpass was between 40 and 50 miles per hour; that he saw the top of the Singer automobile and the top of the Diffendaffer automobile at about the midpoint of the second span of the bridge; that he did not see any collision occurring at the time and was not aware of what the cars were doing; that he could have stopped the Bantam automobile but saw no need to stop; and that he was not aware of any condition or collision necessitating the use of brakes and he did not apply the brakes on the Bantam automobile until it had traveled some 300 feet or about half of the distance to the Singer automobile.

The position of the Singer automobile when the Bantam automobile was at the crest of the overpass was a condition. The failure of Waldo to see what was in front of him and operate the Bantam automobile so that he could stop in time to avoid a collision with the Singer automobile was a subsequent independent act of a third person and an efficient intervening cause. The negligence of Waldo and the alleged negligence of Singer were not concurrent. The proximate cause of the plaintiff's injuries was the negligence of Waldo.

The plaintiff had no right of recovery as against the defendant Singer. The motion of the defendant Singer for a directed verdict made at the close of the plaintiff's evidence and renewed at the close of all the evidence should have been sustained. Therefore, it is unnecessary to discuss the other errors assigned by the plaintiff.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. HARVEY MAHLOCH ET AL., APPELLANTS, IMPLEADED WITH CLAUS SCHRUM, APPELLEE.

116 N. W. 2d 305

Filed July 13, 1962. No. 35130.

1. **Pleading.** The law of amendments should be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule, nor indicated any reason for discontinuing its judicial application.
2. **Eminent Domain.** In order to satisfy statutory requirement of attempt to agree with the owner prior to the institution of condemnation proceedings, there must be a good faith attempt to agree, consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it.
3. ———. The general rule in condemnation cases is that the burden of showing the damages which the landowner or lessee will suffer rests upon him while the burden is on the condemner to show matters which tend to reduce or mitigate damages.

4. ———. **The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the reasonable market value of the land at the time the land is taken or damaged.**
5. **Eminent Domain: Evidence. Whether evidence of an offer to sell is too remote in time to be admissible is for the trial court to determine in the exercise of a sound discretion.**

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Eisenstatt & Lay, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, and A. A. Christensen, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This was a condemnation action brought by the condemner State of Nebraska, Department of Roads, to condemn certain lands to be used as a right-of-way for the interstate highway. The action was brought against the condemnees Harvey Mahloch, the owner thereof, and Alice Mahloch, his wife, who was joined because of her marital interest only, and Claus Schrum who had a mortgage thereon. The mortgagee has been paid the full amount of his mortgage and has no present interest in the action. The State of Nebraska, Department of Roads, will be referred to as the State or as condemner, and Harvey Mahloch and Alice Mahloch as the condemnees, and when condemnee is mentioned in the singular, it will refer to Harvey Mahloch.

The action was commenced in the county court of Douglas County, Nebraska, where the appraisers awarded the condemnee $29,447. The State appealed to the district court for said county. A trial to a jury resulted in a verdict of $22,479, upon which judgment was entered. Condemnees' motion for a new trial being overruled, they have brought the matter to this court on appeal.

At the trial of the case in district court the condemnees filed an amended and substituted answer which, in addition to a general denial and setting out certain allegations concerning value of the premises condemned, contained a denial that the State had attempted to agree with the condemnees by making a good faith offer and a reasonable attempt to induce the condemnees to engage in settlement negotiations and to accept such offer; and alleged that it had failed to negotiate in good faith, and set out for that reason the proceeding was void. On December 27, 1960, condemner filed a reply in the nature of a general denial to the allegations of the amended answer. Thereafter, condemner, on March 9, 1961, filed an amended reply to this same answer in which it was stated that the condemner in preparing for trial had ascertained that while negotiations were had, such do not appear sufficient to meet the requirements of law to vest the court with jurisdiction and that the whole proceeding should be declared void. It prayed for a dismissal without prejudice to the institution of further negotiations and proceedings; and that $14,000 already withdrawn by condemnee, under order of court pursuant to stipulation, be credited on any new award.

On March 13, 1961, the condemner made a motion to withdraw its amended reply and that the original reply of the condemner be reinstated. A hearing was had on the question of withdrawal of the amended reply, at the conclusion of which the trial court permitted its withdrawal and the reinstatement of the original.

It was thereupon stipulated by the parties that the issue of fact as to whether or not there had been a bona fide attempt to negotiate with condemnee and that issue only be submitted to the court without the intervention of the jury. A trial followed in regard to this issue before the court which held that an offer by condemner had been made in good faith and that there had been a bona fide attempt to agree. It found against the con-

demnee and refused to dismiss the proceedings.

A trial to the jury on the question of the amount of damages followed on March 14, 1961, with the verdict and judgment heretofore set out.

The condemnee maintains the trial court erred in permitting the State to withdraw its amended reply to the amended and substituted answer; in not dismissing the State's petition by reason of its filing the amended reply; in not finding the State failed to prove that it had negotiated with the condemnee prior to instituting the action; in instructing the jury that the condemnee had the burden of proving the value of the land condemned; in not admitting certain evidence of two sales of land offered by the condemnee; and in permitting the State's witnesses Grant Miller and Wayne Selby to introduce evidence of sales of other real estate and the sale prices thereof.

The condemner by this action took 9.94 acres of land out of a larger tract of 19.36 acres for the right-of-way of the interstate highway. The northern portion of the premises through which the main highway passed diagonally consisted of a rectangular tract of land approximately 850 feet east and west by 800 feet north and south. The southern portion was also a rectangle which adjoined the first premises at the northeast corner and extended west 450 feet along the south line of the first and south 500 feet, except there had been deeded off by condemnee's predecessor a tract of land 150 feet square in the southeast corner of the southerly portion upon which a filling station had been built. The south side of the condemnee's premises, as well as the filling station property, abutted Pacific Street extending from Omaha, Nebraska. The east line of the premises was on the section line on which One Hundred Eighth Street is located, but that street did not go through to Pacific Street either from the north or south and there was no cross street at this location. An access road connecting Pacific Street with the interstate highway took approxi-

mately 52 feet off the extreme south end of condemnee's premises abutting Pacific Street. The taking left 3.35 acres on the northwest corner of condemnee's premises with no present access, and 6 acres on the south side with access to Pacific Street restricted to one 20-foot entrance.

The action of the trial court in permitting the State on its motion to withdraw its amended reply and to reinstate the original was made after a hearing in which testimony was taken. The witness for the State in this instance was Roy Karr who testified that he was a buyer for the highway department during the times concerning the negotiations. He had been directed to buy certain real estate in connection with building the interstate system, including the condemnee's property. He went upon the property in question. He talked to Quinten Mahloch, condemnee's brother who lived nearby and learned from him that condemnee lived near DeWitt, Nebraska. He went to DeWitt to contact condemnee, taking an offer to purchase the property and the plans to show him. He also had a contract for condemnee to sign. He encountered condemnee in the hayfield about 3 or 4 miles from DeWitt and visited with him. In the month before trial he had been around Minden and Hildreth, Nebraska, and had had no opportunity to confer with the attorney who was to try the condemnation suit. Shortly before the hearing the attorney called him by telephone and they discussed the case. The witness informed the attorney that he had made the condemnee an offer. After this showing the condemner was permitted to withdraw the amended reply and reinstate the original one. Section 25-852, R. R. S. 1943, reads as follows: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect,

or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." It is the contention of the condemnee that this section does not permit the amendments which were permitted by the court in the instant case because it changed substantially the claim or defense and that the wording of this section prevents such changes. As we read this section, the words "when the amendment does not change substantially the claim or defense," is further modified by the remaining portion of the sentence which reads, "by conforming to the pleading or proceeding to the facts proved." These two portions of the quoted section clearly refer to amendments made after trial, and not those before.

In Kleinknecht v. McNulty, 169 Neb. 470, 100 N. W. 2d 77, the questions involved in amending pleadings were considered and the cases of this court were there reviewed. The court in that case held: "The law of amendments should be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule, nor indicated any reason for discontinuing its judicial application." In the cited case the court, in discussing section 25-852, R. R. S. 1943, further stated: "Defendants here invoke the rule relied on in Robinson Outdoor Advertising Co. v. Wendelin Baking Co., 145 Neb. 112, 15 N. W. 2d 388, that an amendment to a pleading may be made, which does not change the issues or affect the quantum of proof as to a material fact, at any stage of the proceeding.

"The rule is a permissive one. It defines one circumstance under which an amendment may be made at any stage of the proceedings. It does not hold that amend-

ments, after answer is filed, may be made only if they do not change the issues nor affect the quantum of proof as to a material fact.

"In the Robinson case the proposed amendment to the answer was offered while evidence was being received and for the purpose of conforming the answer to the proof."

In the case before us the withdrawal of the amended reply and the reinstatement of the original one was made in open court in the presence of opposing counsel after a showing that counsel for condemner had learned that the representative of the State had interviewed and made an offer to the condemnee. It was further shown that the condemner's attorney who tried the case had just learned of the facts which justified the change in the pleadings. The attorney who tried the case in this instance was not the one who filed the petition in the district court or the original proceedings in the county court. We find that the district court committed no abuse of its discretion and hence there was no error in permitting the withdrawal of the amended reply and the reinstatement of the original.

The condemnee contends in his next assignment of error that the action should have been dismissed because of the admissions which were made in the amended reply. This was apparently based on the hope that this court would not sustain the trial court in permitting the withdrawal of the amended reply. Having held that the trial court committed no error by permitting the withdrawal, the matters pleaded in the amended reply were no longer judicial admissions because they were not a part of the pleadings upon which the action was tried. It thereafter became, at most, merely an item to be considered with all the evidence with respect to the sufficiency of the negotiations between the condemner and condemnee.

The issue of fact as to the sufficiency of the negotiation involving the offer of the condemner made to the

condemnee was heard by stipulation of the parties to the court alone without a jury. Karr who carried on the negotiations with condemnee further testified that on this occasion he contacted and talked with the condemnee in the hayfield near DeWitt where he told the condemnee that the State wanted to purchase the land. Karr had with him a small plan of the area the State desired to purchase and he had a contract that condemnee could sign for the purchase of the premises. Karr was prepared to close the transaction if the condemnee would have agreed. They visited for some time. Karr offered condemnee $16,600 for the land involved and told him it was based on an appraisal given to him by the Department of Roads. The condemnee refused the offer. Thereafter, on September 16, 1958, the condemner wrote a letter to the condemnee which he received, stating that he had already been advised by Karr of the State's desire to purchase the premises, describing them; and that Karr had attempted to purchase it but no agreement could be reached. The State made a final offer to condemnee to purchase the premises for $16,600. Contracts for the sale to be signed were enclosed with directions as to signing and forwarding copies thereof. It ended by requesting he reconsider the offer and forward an executed contract, otherwise condemner would consider it necessary to secure title by eminent domain. Condemnee did not accept the State's offer, either in the field to Karr or by answer to the letter, nor did he make any counter-proposition at all.

The provisions of law setting forth the duty of the State towards the owners of lands which are to be acquired for public purposes, such as in the instant case, are set out in section 76-704, R. R. S. 1943. This section merely states that if the condemner shall fail to agree with the condemnee with respect to the acquisition of the premises, condemnation proceedings may be filed. It is not necessary that extended negotiations transpire.

An offer was made to purchase and it would appear to have been made in good faith and honesty. A reasonable bona fide attempt to have it accepted appears to have been made. Condemnee made no attempt to further negotiate. The trial court, then acting in place of a jury, found the offer sufficient. It appears to be sufficient under the rulings of this court. In Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170, this court said: "In order to satisfy statutory requirement of attempt to agree with the owner prior to the institution of condemnation proceedings, there must be a good faith attempt to agree, consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it."

The condemnee's assignment that the trial court erred in its instructions to the jury which placed the burden of proof on the condemnee as to his damages suffered by the taking cannot be sustained. The correct rule with respect to the burden in such cases is set out in Twenty Club v. State, 167 Neb. 37, 91 N. W. 2d 64, in these words: "The general rule in condemnation cases is that the burden of showing the damages which the landowner or lessee will suffer rests upon him while the burden is on the condemner to show matters which tend to reduce or mitigate damages." There was no error in the trial court's ruling.

The next exception to the trial court's ruling which condemnee assigns as error consists of excluding certain evidence with respect to the sale price of other lands on objections thereto. Errors are assigned with respect to two such rulings. The first is in regard to the refusal to accept exhibit 15, a certified copy of a deed from Quinten R. Mahloch, the brother of the condemnee, to one Samuel N. Wolf, and other evidence of the brother who offered testimony in regard to the sale price involved in this transaction. The sale was of a tract adjoining the condemnee's land. Previously, the brother who testified had owned both the condemnee's

land and the portion sold off the larger tract by the deed to Samuel N. Wolf. The sale, which was excluded from evidence, involved a small tract which aside from a portion occupied by the roadway was 150 feet square. It was bought for the purpose of erecting a filling station thereon. The sale took place in October 1956. At that time there were no zoning regulations covering the property in the locality where it or the condemnee's land lay. In September 1958, when the taking in condemnation occurred, there were zoning regulations in the area preventing the use of the land taken for any commercial purpose. The plot sold to Wolf abutted Pacific Street. There was considerable evidence by witnesses for the condemnee that the zoning regulations on application might be changed without difficulty to allow commercial development, and other testimony that other owners might object to such rezoning and changes which might be difficult or impossible to be made. In any event the zoning regulations prohibited commercial building at the time of the condemnation and under the circumstances there was nothing to show that the remaining 277.2 feet of the condemnee's land which abutted Pacific Street could be used for any commercial purposes. In Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209, this court said that: "The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the reasonable market value of the land at the time the land is taken or damaged." We cannot say that the trial court erred in excluding evidence of the sale price of this relatively small tract sold for a specific purpose when the evidence showed that at the time of condemnation similar commercial uses of condemnee's land were not available.

The other testimony in regard to a sale sought to be admitted by condemnee, which the court finally excluded after first receiving it, related to a tract of 11⅓ acres which adjoined the condemnee's land to the

east. The date of the sale was December 29, 1959, or 15 months after the condemnation. The interstate highway was then built or being built. The exhibits previously introduced show that an entrance and exit to Pacific Street was but a short distance from the land so sold. The condemnee's witness did not testify as to the condition of the zoning at the time this subsequent sale was made. It was not shown whether or not it was sold for a specific purpose. The witness had talked to the seller but not to the purchaser and had not ascertained the intended use. The condemnee's witness admitted that the impact of the building of the interstate highway with its access road connecting with Pacific Street, on which this land had a considerable frontage, had changed the condition although the witness testified it was hard to say whether it had changed for the better. The condemner's attorney argued that the conditions shown after the condemnation could not be shown because it would not have been possible for the condemnee or prospective purchasers of his land to be influenced in the value and price to be paid therefor by events which might occur in the future. Neither did the condemnee's witness who testified in regard to this particular sale give any measure or scale which the jury might have used in relating the value of condemnee's land at the time of the taking to this particular sale, though the witnesses admitted that the value of the land had risen in a considerable amount between the time of the taking and the later sale. Without holding that sales subsequent to the taking cannot be shown in the proper instance, we find that the exclusion of this sale under the circumstances and with the changed condition without any rule to relate the change in value to the time of the taking of condemnee's land was a matter within the sound discretion of the court. In Timmons v. School Dist., 173 Neb. 574, 114 N. W. 2d 386, this court held: "Whether evidence of an offer to sell is too remote in time to be admissible is for the trial court

to determine in the exercise of a sound discretion."

We now come to the last assignment of error which involves the reception of evidence of the witnesses for the State, Grant Miller and Wayne Selby, concerning sale prices of certain lands within the area of that of the condemnee. The assignment of error itself does not point out the particular sales in the testimony given, to which the condemnee objects. However, most of these sales are discussed in the condemnee's brief either in the evidence or argument. The testimony of the witnesses Grant Miller and Wayne Selby, who offered the evidence concerning the other land sold and the sale price thereof, includes several sales. The condemnee's brief says there were at least eight. The exact number depends on whether certain sales which appear to be made about the same time by the same parties, or one of them, in what would appear to be an effort to assemble a larger tract from several small ones, are to be considered as one or several sales. If every separate sale is considered there are more than eight.

The objections with respect to these sales are to the price of the land being given to the jury. Every objection, except in one instance, is confined entirely to that of no sufficient foundation laid. In that one instance the objection was finally sustained. This opinion would be unnecessarily and unjustifiably lengthened if we were to take up the several sales and the evidence concerning each in respect to foundation. We have carefully looked over the testimony of these witnesses who were fully qualified as real estate dealers, familiar with the area, and well versed in matters affecting land such as this with respect to its adaptability to suburban development and its location with reference to the growth of the city. In each instance they compared the land involved in the separate sales to that of the condemnee. The dates of the independent sales were given. A map was introduced in evidence showing the area west of Omaha in the vicinity of the plaintiff's land and showing

the principal streets leading westward from the city as well as the cross streets. The condemnee's land was located by markings thereon and most at least of the lands so sold and used in comparison were likewise located and marked thereon. Testimony in each instance was given as to its comparison with the land taken. In some instances the evidence was more detailed and extensive than in others. In addition to the testimony involving the particular tract separately, each witness when first questioned set out in considerable detail what was done by him to familiarize himself, not only with the condemnee's land, but those used in comparison and some of the things which he thought justified their comparison. When the testimony as to the particular tracts is considered with the general statements in regard to matters considered in making the comparisons, the foundation appears to be quite adequate. Indeed that given as to the separate tracts appears to be sufficient as to the character of the land, the date of the sale, and that it was bona fide between the buyer and seller.

The condemnee objects particularly as to the dates of the comparative sales which he contends were too remote. There are peculiar issues in the case that seem to justify the State in introducing evidence of sales over a more extended period than in a usual case in order to present its contentions to the jury. A witness on behalf of condemnee had previously testified that within a week or 10 days after the announcement on March 1, 1956, that the Western Electric Company plant was coming, land doubled in value almost overnight, and that the land in question upon which a filling station had been built was worth three times as much as before. The witness later testified that condemnee's land and surrounding property almost doubled or tripled in value overnight, and that this was the effect on all property from Ninetieth Street out as far as One Hundred Fifty-sixth Street in the western part of the Omaha vicinity

and was not confined to the land adjacent to the Western Electric Company plant. The condemnee's witness Wear testified the market changed with the announcement of the Western Electric Company plant and that it came as a complete shock.

The State's witnesses admitted a rise in real estate values in the vicinity but maintained it was not nearly as rapid as claimed by those of the condemnee. In certain instances where other land was compared and its value was given as of 1956, the witness testified that the values in the area were then advancing 2 percent a month and that this fact was taken into consideration by the witness when he gave his opinion as to the value of the condemnee's premises. The witness Selby testified he kept records of all sales in his office and verified them from the public records. Further he said that in studying the sales in the area for a considerable time he had concluded that there was very little increase in the value of land from 1954 to 1956, but that in 1956, 1957, and 1958, there was a constant rise in the selling price of land determinable by these sales and that the rate of increase could be projected therefrom. That the rate of increase was 1¼ percent per month from 1956 to 1957, and starting in 1958, it went up 2.4 percent each month. With this yardstick before it the jury was given the sale price of the lands compared by the witnesses during the period, some going back to the year 1954. The two theories were presented to the jury, the one that on the coming of the Western Electric Company plant the land values had suddenly risen two or three-fold, the other of steady but less pronounced raise. Under the circumstances of the two conflicting theories presented by the parties we cannot say the trial court abused its discretion in admitting the sale price of other lands compared by the witnesses during the whole period. The jury was given the conflicting evidence, both on this issue and that as to the adaptability of condemnee's land to commercial or residential development. It was al-

lowed thereafter to view the premises when it had these issues all before it. It was the exclusive judge of the evidence as to value. The questions of admission of the sale prices of other land and the sufficiency of the foundation for their admission were within the sound discretion of the court. Timmons v. School Dist., *supra*. We find no error of the trial court in the admission of the evidence concerning the other land and the sale price thereof.

The several errors assigned to the rulings of the trial court cannot be sustained and it follows the judgment should be affirmed.

AFFIRMED.

KENNETH NORDAHL, APPELLANT AND CROSS-APPELLEE, V. GORDON A. ERICKSON ET AL., APPELLEES AND CROSS-APPELLANTS.
116 N. W. 2d 275

Filed July 13, 1962. No. 35264.

1. **Workmen's Compensation.** Disability under section 48-121, R. R. S. 1943, subdivisions (1) and (2), is defined by our statute in terms of employability and earning capacity rather than in terms of loss of bodily function.
2. ———. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof.
3. ———. For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.
4. ———. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law.

Appeal from the district court for Butler County:

H. EMERSON KOKJER, Judge. Reversed and remanded with directions.

Kanouff & Brown, for appellant.

Cline, Williams, Wright, Johnson, Oldfather & Thompson, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SIMMONS, C. J.

This is a workmen's compensation case. The plaintiff sought a permanent total disability award. The one-man compensation court awarded a 45 percent permanent partial disability to the right foot. Plaintiff refused to accept the award and had a hearing before the Workmen's Compensation Court, en banc. There he received an award of 45 percent permanent partial disability of his right foot, an award for the loss of a small toe on the left foot, and a 12 percent permanent partial disability to his body as a whole.

Plaintiff took the matter to the district court where, under our procedure, it became an error proceeding. Defendants cross-appealed, praying that the order of the compensation court be set aside. The district court found no error in the decision of the compensation court and dismissed both the appeals of the plaintiff and defendants.

Plaintiff appeals here where, under our procedure, the matter is for trial de novo on the record made before the compensation court. Defendants cross-appealed.

In effect, the plaintiff contends here, as he has throughout, that he is entitled to permanent total disability under the provisions of section 48-121 (1), R. R. S. 1943. Defendants, in effect contend for an award under the provisions of section 48-121 (3), R. R. S. 1943, and for the right foot only.

We find that the plaintiff is entitled to an award of permanent total disability. We reverse the judgment

of the trial court and remand the cause with directions to enter an award in accord with this opinion.

Plaintiff, at the time of the accident, was about 36 years of age. He was married and the father of two children whose ages are not shown. He weighed about 200 pounds. He quit school in the 10th or 11th grade. He was born and raised on a farm. All his life he had engaged in hard physical labor for a livelihood.

There is no suggestion in this case that plaintiff is malingering.

The accident here involved occurred September 3, 1958. Up until about 2 years prior thereto, he had lived and worked on a farm, first as a laborer, then in some sort of partnership with his mother. After marriage, he rented a farm and farmed for himself.

Twenty years or more, before this accident, he had broken a bone in the small toe of his left foot. It resulted in a "hammertoe." It, in no sense, was disabling. He also had had some lower back trouble for which he was examined at Mayo's some years before this accident. It was not disabling. It is not involved here.

Somewhere in this period, he and his family inherited a farm of 200 acres of which about 100 acres was pasture land and about 100 acres tillable land. The plaintiff's interest in the farm or whether it was owned free from encumbrance is not shown.

About 2 years before this accident, plaintiff quit farming and engaged in common labor in the construction industry. At the time of the accident, he was working as a carpenter, cement finisher, and anything they wanted him to do. He was working at the top of a grain elevator and above a shaft which was rectangular in shape and about 20 x 27 inches in dimension. The shaft was 180 feet high. Beneath it was an open space of some 18 feet to a concrete floor which at the time had debris of construction material on it.

A ladder on which plaintiff was standing worked loose and plaintiff fell, feet downward, the entire length

of the shaft and open area beneath. His size was such that he about fitted the shaft. He was able to slacken his fall by body and limb pressures on the sides. He was at all times fully conscious. He first struck the concrete floor on his feet, then his buttocks, and then his back. His body had multiple abrasions of the skin, particularly on his arms and legs from contact with the walls of the shaft. With the exception of his right hand, they do not enter into the problem here.

In view of the fact that the question here is whether he had a single permanent injury to the right foot or multiple injuries causing permanent injury to his body as a whole, we discuss each injury separately.

The physician and surgeon who cared for plaintiff throughout became defendants' expert witness.

Plaintiff's right ankle was obviously smashed as a result of the impact. Efforts were made to restore it and finally, after two or more operations, it was fixed permanently immobile. There is no dispute about that, neither is there dispute that his right leg is three-quarters of an inch shorter than the left. It is the above injury for which defendants admit liability under the provisions of section 48-121 (3), R. R. S. 1943, as a scheduled injury.

In addition to the above, plaintiff's expert witness testified that there was a "marked atrophy of the muscles of his right leg." This was not limited to a below the knee situation and we do not find it denied by defendants' expert witness.

The other of plaintiff's expert witnesses testified that plaintiff, in such movements as getting down on his legs, was awkward and there was some weakness or loss of co-ordination of the right side. He illustrated this by reference to his ability in getting down to replace "a nut in a machine or anything like that."

Defendants' witness makes no reference to this testimony and was not asked.

When doing work, plaintiff wears a steel brace from

his shoe to the right knee, as prescribed by defendants' expert witness.

We go now to the left foot. At the time of his first examination, the surgeon found a moderate swelling of the left foot with complaint of tenderness over the dorsum of the foot and some tenderness of the hammer toe. Shortly after the accident, the surgeon operated on and removed a bone from the hammer toe and found "probability" of reinjury to it in the accident. He testified, however, that he performed the operation as a favor to the plaintiff and undertook as a witness for defendants to remove injury to the left foot from plaintiff's disabilities caused by the accident. However, the surgeon prescribed, and plaintiff wears, an arch support on his shoe under the instep of his left foot.

Plaintiff testified that he could not walk barefoot in the house without pain in both feet. When he walks at all with a shoe on, he does so with the weight put on the big toe and heel of the left foot, to avoid pain.

As to the use of his feet, the undisputed evidence is that plaintiff could not stand on his feet for more than 10 minutes without pain often followed by edema. Walking, particularly on rough sufaces, about the farmyard is a constant source of pain and danger.

Plaintiff's right hand, and particularly the index finger, received the worst of the abrasions in the fall. No bones were broken. The testimony is that plaintiff's right hand has lost some of its strength, there is a numb area in the heel of the hand, and misplacement of bones in the wrist. Plaintiff has complained to the doctors of pain in that wrist every time he uses it, and concededly, it has a restricted use. There is also some evidence of pain in the right arm area. Plaintiff is a right-handed man.

At the time of his first examination, plaintiff complained of tenderness throughout his back. He has continuously complained of tenderness in his upper back between his shoulder blades and in his neck. We will

make further reference to this in connection with his use of a farm tractor.

He can neither lift nor carry articles of much weight.

Such then is the present condition of a man who, prior to this accident, could do the hardest of hard common labor, and, in his own language, there were few who could follow him. Defendants would have us find that he has only a permanent injury to his right ankle.

We have no difficulty in finding that he has a disability to his body as a whole. Plaintiff's expert witness so testified. In a report to the insurance carrier, defendants' expert witness so stated. The divergence of views here seems to be that plaintiff's expert witnesses find subjective symptoms of pain and disability, whereas defendants' witness undertook to limit his ratings to objective symptoms only.

Plaintiff's expert witness fixed the disability to the body as a whole as a 25 percent permanent partial disability. The question then arises as to how much compensation plaintiff is entitled.

We have held: "Disability under section 48-121, R. S. Supp., 1953, subdivisions (1) and (2), is defined by our statute in terms of employability and earning capacity rather than in terms of loss of bodily function. * * * In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof." Miller v. Peterson, 165 Neb. 344, 85 N. W. 2d 700.

As we stated the question in Pavel v. Hughes Brothers, Inc., 167 Neb. 727, 94 N. W. 2d 492: "What, then, is the evidence as to plaintiff's ability to perform labor and to earn an income in his particular line of work or in any other for which he is fitted?"

There is no contention here that plaintiff is employable as a common laborer, carpenter, or cement finisher, being the work in which he was engaged when injured.

The defendants contend here that plaintiff is a trained, experienced farmer and can do that work. This is not

based upon any evidence of employability as a farm hand. He operates a farm, owned by himself and family and, apparently, had done so in the years 1960-1961. The evidence is that it is not a profitable operation because of the necessity of employing labor. His herd of cattle has increased from 25 to 70, with no evidence as to whether they are encumbered or free from debt. The sole evidence as to plaintiff's activity in this regard is that he, apparently, accompanies some shipments of cattle to the market at Omaha and sells them.

Plaintiff's wife and children do the chores, attend the cattle, and work in the fields. At the time of this hearing in July 1961, plaintiff was employing four hired men.

Plaintiff's tillable ground is devoted to row crops, partly irrigated. Some of the work in connection with it is done by tractor. Defendants stress the testimony of plaintiff that he did about 75 percent of the tractor work in 1961 and less in 1960. But that is not the whole story. The question is as to how and to what extent, he was able to do it. The undisputed testimony is that he could drive the tractor for 2 or 3 hours and then was required to rest. He was unable to use his right foot in manipulating the tractor brake, etc. He sat sideways when that was necessary and did the foot work with his left foot. If he was pulling a following implement requiring that he look back and turn to do so, he immediately had pain in his neck and upper back, and sometimes a locking of the neck. The amount of work which plaintiff was able to perform in hours, days, or seasons is not shown. There is no showing of employability as a farm laborer except insofar as he works for himself, when able, and to the extent above-shown. On occasion, where necessity required, he would sometimes work as many as 8 hours a day with the tractor, followed by spending the next day in the house.

We think the evidence shows that plaintiff is not employable.

Our comment in Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262, is applicable: "He is, therefore, what is called an 'odd lot' man, the nondescript in the labor market, with which industry has little patience, and rarely hires. Work, if he finds any that he can do, is casual and intermittent. He is utterly unable to do the work he did before this accident. Under these facts, we think we are justified in finding that in his present handicapped condition he is entitled to an award for total disability under the Nebraska Compensation Act."

We quoted from the above case in Rapp v. Hale, 170 Neb. 620, 103 N. W. 2d 851, as follows: " 'For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. * * * A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law.' "

We find that plaintiff is permanently and totally disabled and entitled to compensation as such under the provisions of section 48-121 (1), R. R. S. 1943.

We do not undertake to tabulate the period of the beginning of compensation payments. We anticipate that the parties will be able to do that without difficulty.

The judgment of the trial court is accordingly reversed and the cause remanded with directions to enter judgment in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., dissenting.

I do not agree that the record in this case sustains a finding that plaintiff was totally and permanently dis-

abled. The case involves schedule injuries and other claimed injuries to other members, and a further contention of permanent injury to the body as a whole.

We have few cases in this state in which the relation of a schedule injury to injury to the body as a whole has been considered. The opinion of the majority appears deficient in the consideration of this problem.

The plaintiff sustained an injury to his right foot which, standing alone, would be compensated for as a schedule injury as defined in subdivision (3) of section 48-121, R. R. S. 1943. There is no medical evidence in the record that the injury to the right foot constituted more than 40 to 50 percent permanent disability of the right foot.

The evidence shows that plaintiff's physician removed a hammertoe from his left foot which was a condition that did not result from the accident. There was some evidence of injury to the top of the left foot. Examination by X-ray showed no fracture, but revealed an arthritic condition which had developed over a period of time before the accident, No objective symptoms of injury to the left foot were found. No doctor testified as to any amount of permanent disability to the left foot.

There was evidence of some injury to the right wrist. An orthopedic physician testified that the distal end of the ulna lies dorsal-ward from the usual relationship with the radius. There was no evidence of fracture. There is medical evidence that this condition is occasionally seen as a natural development in a normal wrist. There is no medical evidence that the wrist condition was the result of the accident and plaintiff's doctor made no separate permanent disability rating as to the right hand and wrist. In fact, the medical experts considered the condition of the right wrist of no importance.

Plaintiff asserts that he suffered injury to his back. He was treated at the Mayo Clinic for lower back discomfort in February 1958, prior to the accident. No objective evidence of traumatic injury to the back was

found and no doctor attempted to fix any percentage of permanent injury to the back or to the body as a whole resulting from the claimed back injury. There was evidence of tenderness in the shoulder blade and dorsal spine area. The medical evidence is that this was caused by an osteoarthritic condition and the use of crutches during the period of convalescence, without any indication of permanency. There is some medical evidence that plaintiff would suffer pain in his back in the future. The disability from such pain is not rated nor is there medical evidence that it was the result of the accident.

I think the provision of subdivision (3) of section 48-121, R. R. S. 1943, providing total and permanent disability for the loss of two feet means a complete loss of use of such two members. What then if one or both members under subdivision (3) have not been injured to the extent of permanent total loss of use. Under such circumstances I think the rule stated in Radford v. Smith Bros., 123 Neb. 13, 241 N. W. 753, applies. The announced rule in that case is that a claimant for compensation who has sustained injury to both legs and both hands is entitled to recover such proportion of compensation allowed for total disability as the extent of loss of the several members bears to the total loss of two such members. See, also, Frost v. United States Fidelity & Guaranty Co., 109 Neb. 161, 190 N. W. 208; Johnson v. David Cole Creamery Co., 109 Neb. 707, 192 N. W. 127; Schlesselman v. Travelers Ins Co., 112 Neb. 332, 199 N. W. 498; Ashton v. Blue River Power Co., 117 Neb. 661, 222 N. W. 42. Under the foregoing rule the plaintiff is entitled to recover permanent partial disability benefits under subdivision (1) in the proportion that the extent of his loss to such members would bear to the total loss of two such members.

A traumatic injury to the back resulting from the accident would raise a question that we do not have before us, as I view the evidence. There is no evidence that the back injury was caused by the accident, al-

though it is one that could well have been lighted up by the accident in view of its nature. The evidence of back injury was subjective only. No objective symptoms were found, other than the preexisting osteoarthritic condition previously mentioned. An injury to a back based only on the complaints of pain by the claimant should not be accepted as proven in the absence of medical support. Magnolia Pipe Line Co. v. Smith, 167 Okl. 316, 29 P. 2d 569.

There is no medical proof that the claimed injury to the right wrist or to the back was the result of the accident and, what is more important still, there is no medical proof that such injuries result in any disability chargeable to the accident. The burden of proof is on plaintiff to prove these facts. The plaintiff testifies that he was able to do 20 percent of his tractor work in his farming operations during the first year following the accident and that he was able to do 75 percent of it the second year. This is a clear indication of physical improvement and a confirmation of the medical evidence finding partial permanent disability only. As I view the record, the case should be determined as a two-member injury requiring an award of partial permanent disability under the rule announced in Radford v. Smith Bros., *supra,* and other cases announcing the rule of that case.

The Workmen's Compensation Act provides that the loss of use of two feet shall constitute total and permanent disability and shall be compensated for according to the provisions of subdivision (1) of section 48-121, R. R. S. 1943. It does not authorize the granting of total permanent disability where the use of one or both injured members are not wholly disabled. This court has held on many occasions that it is immaterial whether or not industrial disability is present in a schedule injury. Bronson v. City of Fremont, 143 Neb. 281, 9 N. W. 2d 218. Since the competent evidence before the court in the present case relates to the injury of two

schedule members, the matter of industrial loss and employability is not material. Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N. W. 2d 11. The plaintiff is therefore entitled to an award of permanent partial disability calculated under the rule of Radford v. Smith Bros., *supra*. See, also, Paulsen v. City of Lincoln, 156 Neb. 872, 58 N. W. 2d 336. The failure of the majority to apply the rule of that case affords the basis of this dissent.

Assuming a compensable injury to the back, a basis for an additional award exists. A 40 to 50 percent disability of the right foot, a lesser unrated disability to the left foot, and an unrated disability to the back based on subjective symptoms not supported by medical evidence do not in my opinion support a finding of permanent total disability.

STATE OF NEBRASKA, APPELLEE, V. JAMES EARL GOFF, APPELLANT.
117 N. W. 2d 319

Filed October 5, 1962. No. 35316.

Criminal Law. An appeal in a criminal action will not be dismissed because the notice of appeal fails to state the nature of the offense and the sentence imposed as required by section 25-1912, R. S. Supp., 1961.

Appeal from the district court for Dakota County: JOHN E. NEWTON, JUDGE. On motion to dismiss appeal. Motion to dismiss overruled.

Mark J. Ryan, for appellant.

Clarence A. H. Meyer, Attorney General, and Cecil S. Brubaker, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

The defendant was convicted and sentenced for possession of narcotics in violation of section 28-470, R. R. S. 1943. Within the time prescribed by statute the defendant filed a notice of appeal in the office of the clerk of the district court which failed to "state the nature of the offense and the sentence imposed" as required by section 25-1912, R. S. Supp., 1961. The State has moved

to dismiss the appeal for the reason that the notice of appeal failed to comply with the statute.

It is necessary that this court know the nature of the offense and the sentence imposed before a suspension of the execution can be ordered in a proper case. For that reason section 25-1912, R. S. Supp., 1961, requires that a statement of the nature of the offense and the sentence imposed be included in a notice of appeal filed in a criminal case.

The statute, which formerly applied to only civil actions, was amended in 1941 to simplify the procedure for perfecting an appeal from the district court to this court. It provides that no step other than the filing of a notice of appeal and the payment of the docket fee (or the filing of an affidavit of poverty as provided in section 29-2306, R. S. Supp., 1961, in lieu of the payment of the docket fee) shall be jurisdictional. We do not believe that a defendant in a criminal action should be denied a review of his conviction and sentence in this court because of a failure to comply with a procedural requirement relating to a suspension of execution of the sentence.

The motion is overruled.

MOTION TO DISMISS OVERRULED.

ELLA P. COKER, APPELLEE, V. ALFRED M. COKER, APPELLANT.
117 N. W. 2d 320

Filed October 12, 1962. No. 35192.

Divorce. In the absence of evidence showing a change in circumstances, there is no basis upon which the judgment in a divorce action which has become final can or should be modified.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Reversed and remanded.

Young, Holm, Miller & McEachen, for appellant.

Wear, Boland, Mullin & Walsh, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SIMMONS, C. J.

This appeal involves another and somewhat narrow segment of the marital difficulties between the parties above-named. One phase of the case reached us and was determined in Coker v. Coker, 173 Neb. 361, 113 N. W. 2d 329.

In the opinion in the above case, we set out essential parts of the property settlement agreement entered into by the parties which was approved by the trial court, and incorporated in and made a part of the decree of divorce. It will not be repeated here.

Pursuant to that agreement, a home was selected in California and paid for by the defendant. Plaintiff moved there with substantially all of the household furniture. Plaintiff and the minor daughter established a residence there.

Plaintiff later decided that she wanted to return to Omaha and live there. That precipitated the controversy decided in Coker v. Coker, *supra*.

While defendant's appeal was pending, plaintiff shipped the household goods to Omaha and placed them in storage. She surrendered the keys to the house to an agent of the trustee who sold it and has the proceeds in trust.

For a short time, she and the daughter resided with a friend in Omaha. Defendant objected to his daughter being there. Plaintiff and the daughter then moved to a motel, where they lived close to a tavern and swimming pool, and ate in a public cafe. Defendant objected to that. Plaintiff then advised defendant that she could rent an apartment near a private school. Defendant objected to that because of traffic hazards.

A controversy arose about visitation privileges accorded the defendant and this present litigation arose.

Defendant refused to pay the rent on an apartment in Omaha until the appeal above-cited was determined. Defendant, for business reasons, wanted to live in California and wanted his daughter there.

We find no evidence in the record as to the rent which plaintiff was paying at the motel. So far as we can determine from this record, they are still living there.

Hearings were had on this matter on August 2, 1961, and subsequently on August 9, 1961, at which time the parties submitted their cause and rested.

On August 15, 1961, without any showing as to who was present besides the court and plaintiff's counsel, the court was advised that plaintiff had found an apartment which "she feels" would meet with defendant's approval at a monthly rental of $235 and that she was going to sign a one year's lease "right now." Whether the lease was ever signed or whether plaintiff moved into the apartment with her daughter does not appear.

On the basis of that record, the trial court signed an order requiring the defendant to pay or cause the trustee (who is not a party here) to pay the rental of $235 a month beginning August 1, 1961, and to continue until the further order of the court or until housing was furnished "in accordance with the property settlement agreement" or until otherwise ordered by this court. The court also allowed an attorney's fee for plaintiff's counsel.

On August 7, 1961, by letter, the plaintiff's counsel submitted the addresses of three houses in Omaha which she deemed suitable, and asked defendant to select one in accord with the property settlement. The "asking price" of two of the three was substantially more than had been received by the trustee from the sale of the property in California. Defendant's counsel refused to act until this court had decided Coker v. Coker, *supra*.

Defendant's assignments of error here are two. One, that the court erred in ordering the defendant to pay the rental on the apartment. Two, that the court erred in ordering the defendant to pay the rental without

evidence as to its reasonableness. The allowance of attorney's fees is not assigned as an error although discussed in the brief.

The quesions presented here were decided in Coker v. Coker, *supra.*

We there held that the decree in the divorce case was binding on both of the parties and not subject to modification in the absence of a showing of a change of circumstances.

The specific holding was: "In the absence of evidence showing a change in circumstances, there is no basis upon which the judgment in a divorce action which has become final can or should be modified."

Obviously, the trial court proceeded on the theory that in its own language at the beginning of the hearing, "* * * we are completely beyond the provisions of the agreement at this point." Counsel stated that the question was one of securing temporary housing "until we can enforce the original decree." The court concurred. It appears throughout, until the decree when the trial court ordered the $235 a month payments to begin on August 1, 1961, there being no lease in existence or contemplation at that time, the payments were to continue "until housing is furnished in accordance with the property settlement agreement." The court assumed the right to modify the property settlement agreement, by requiring the defendant to pay more than he agreed to pay.

The agreement specifically sets out the procedures to be followed "in the event a second home is acquired." Those procedures have not been fully followed. No mention of rental of a home is found in the agreement. For aught that appears, it would increase the defendant's financial burden beyond the terms of the obligations assumed in the property settlement.

We find no justification for the decree of the trial court in the above matter. The decree is reversed and the cause remanded for proceedings within the frame-

work of the original decree and property settlement agreement and in the light of our decision in Coker v. Coker, *supra*, as to the rights of the parties.

The attorney's fees allowed plaintiff in the trial court will not be disturbed. No further allowance is made. All costs are taxed to the plaintiff.

REVERSED AND REMANDED.

IN RE ESTATE OF MARY LORETTA POLLY, DECEASED.
MABLE V. COOK, APPELLANT, V. DONNA KETCHMARK ET AL., APPELLEES.
117 N. W. 2d 375

Filed October 12, 1962. No. 35215.

1. **Wills.** In a will contest upon the ground of undue influence the burden is upon the contestant to prove by a preponderance of the evidence (1) that testator was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of undue influence.
2. ———. In a will contest, where undue influence is alleged, that question should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of testator, but the result of undue influence exercised upon him.
3. ———. Undue influence is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, mental condition, as shown by the evidence, and opportunity afforded designing persons for the exercise of improper control.
4. ———. In making proof, a contestant is not limited to the bare facts that he may be able to adduce, but he is entitled to the benefit of all inferences which may be legitimately derived from established facts.
5. ———. The declarations of a testator are admissible to show his state of mind and consequent susceptibility to undue influence.
6. ———. While it is a generally accepted view that the mere existence of confidential relations between a testator and a

beneficiary under his will does not raise a presumption that the beneficiary has exercised undue influence over the testator, the relationship between the two may be considered with all of the other facts and circumstances in the case in determining undue influence.

7. ———. The fact that a will is unnatural or unreasonable in the distribution of property is a circumstance to be considered by the jury in connection with other evidence bearing on the question of whether the will is the result of undue influence.

8. Evidence: Appeal and Error. When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof of the facts sought to be put in evidence by the question in order to present the ruling to this court for review.

Appeal from the district court for Greeley County: WILLIAM F. MANASIL, Judge. Affirmed.

Harold E. Connors and Ernest A. Ondracek, for appellant.

E. L. Vogeltanz, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This action arose as a result of Donna Ketchmark, Julia Warwick, Roy Hughes, Walter Hughes, Frank Hughes, Veda Connor, John Hughes, Alice Noski, Irene M. Lewis, Reuben Hughes, Ray Hughes, Tom Hughes, Verna Peterson, and Carlton Hamilton, nephews and nieces of the deceased, and Mr. and Mrs. Boyd McKenzie, objecting to the allowance for probate of the last will of Mary Loretta Polly, deceased. The trial court for Greeley County submitted to a jury the issue of whether or not the will was the result of undue influence exercised over the deceased by Mable V. Cook, a niece of the testatrix. The jury found that the last will of Mary Loretta Polly, dated October 16, 1959, was not a valid last will and was null and void. The proponent then filed a motion asking the court to render judgment notwithstanding the verdict. The proponent also filed a

motion for a new trial. Both of the above motions were overruled. The proponent perfected appeal to this court.

At the close of the contestants' evidence, the proponent moved the court to dismiss the objections of the contestants for the reason that the evidence was insufficient to go to the jury on the issues raised by the contestants' objections. The proponent made the same motion at the close of the case. At the close of the proponent's evidence, the contestants moved the court to declare that the last will of the testatrix be held invalid for the reason that the proponent failed to make a prima facie case as to the validity of the will. The motions made by the proponent and the contestants were overruled.

The proponent's assignments of error may be summarized as follows: That the verdict is contrary to the law and not sustained by the evidence, and that the trial court erred in giving instruction No. 12 on its own motion to the jury.

"In a will contest upon the ground of undue influence the burden is upon the contestant to prove by a preponderance of the evidence (1) that testator was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of undue influence." Benge v. Sutton, 169 Neb. 769, 100 N. W. 2d 857.

"In a will contest, where undue influence is alleged, that question should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of testator, but the result of undue influence exercised upon him." In re Estate of Strelow, on rehearing, 120 Neb. 242, 233 N. W. 889.

"Undue influence is usually surrounded by all possible secrecy. It is almost always difficult to prove by

direct and positive proof. It is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, mental condition, as shown by the evidence, and opportunity afforded designing persons for the exercise of improper control." In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80.

"In making proof, a contestant is not limited to the bare facts that he may be able to adduce, but he is entitled to the benefit of all inferences which may be legitimately derived from established facts. * * * The declarations of a testator are admissible to show his state of mind and consequent susceptibility to undue influence. * * * While it is a generally accepted view that the mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary has exercised undue influence over the testator, the relationship between the two may be considered with all of the other facts and circumstances in the case in determining undue influence." In re Estate of Bowman, 143 Neb. 440, 9 N. W. 2d 801.

The fact that a will is unnatural or unreasonable in the distribution of property is a circumstance to be considered by the jury in connection with other evidence bearing on the question of whether the will is the result of undue influence. See, In re Estate of Bowman, *supra;* In re Estate of Bainbridge, 151 Neb. 142, 36 N. W. 2d 625.

It is permissible not to strive to separate each fact supported by evidence offered as proof of undue influence and allocate it under one or more of the four essential elements requisite to establish the exercise of undue influence, but to view the entire evidence offered by the contestants as proof of this issue and rest the decision upon whether or not the evidence as a whole is of such a substantial nature as to contain some proof of each of the essential elements, and to require that the issue of undue influence be submitted to and determined

by a jury. See In re Estate of Bainbridge, *supra.*

For convenience we will refer to Mary Loretta Polly as Mrs. Polly and to Mrs. Mable V. Cook as Mrs. Cook. It will be noted by the evidence that Mrs. Polly at times is referred to as Aunt Rett.

Mrs. Polly was a widow, 87 years of age, and a resident of Scottsbluff. She had a son, Harry Graham, who contributed to her support. On July 26, 1959, her son died. Mrs. Polly inherited from his estate. Mrs. Polly continued to live in Scottsbluff until September 1959. In that month she fell, and was taken to a hospital. While in the hospital she wrote to Mrs. Cook, a niece who lived at Greeley, and to Emmett Hughes, a nephew who lived at Burwell, asking them to come and see her. It appears from the record that Mrs. Polly had several nephews and nieces whom she had not seen for a number of years. Mrs. Cook testified that she had corresponded with Mrs. Polly for about 10 years. Mrs. Cook asked her son to take her to Scottsbluff on September 18, 1959. Mrs. Cook, Emmett Hughes, and his wife, Monia Hughes, left for Scottsbluff with Mrs. Cook's son Pat. They arrived early in the morning. Emmett Hughes and Pat Cook returned home, and Mrs. Cook and Mrs. Hughes remained in Scottsbluff. They went to the hospital to see Mrs. Polly and were informed that she could leave the hospital if she had someone to take care of her. She was released from the hospital on September 20, 1959, and returned to her apartment in Scottsbluff with Mrs. Cook and Mrs. Hughes.

Prior to the arrival of Mrs. Cook and Mrs. Hughes, Mrs. Polly had consulted an attorney with reference to making a will and about the inheritance she had received from her son. On September 22, 1959, Mrs. Polly requested her attorney to come to her apartment and prepare a will. The same evening the attorney and his wife returned to the apartment and the will was signed by Mrs. Polly and witnessed by the attorney and his wife as attesting witnesses. This will provided in sub-

stance that one-tenth of the estate was bequeathed to Emmett Hughes; an undivided one-tenth was bequeathed to Mrs. Cook; an undivided one-fifth was bequeathed to the sons and daughters of Mrs. Polly's sister Nora Hughes who were living at the time of the death of the testatrix; an undivided one-fifth to the sons and daughters of Mrs. Polly's sister Sadie Hughes who were living at the time of her death; an undivided one-fifth to the sons and daughters of her brother Mark Hamilton who were living at the time of her death; and an undivided one-fifth of her estate to her good friends Mr. and Mrs. Boyd McKenzie of Scotts Bluff County or the survivor of them. The will nominated and appointed Boyd McKenzie as her executor. This will was executed on September 22, 1959.

Mrs. Polly was not entirely satisfied with the will and called her attorney for the purpose of making some changes in it. The next day, September 23, 1959, Mrs. Polly, Mrs. Hughes, and Mrs. Cook left by train for Grand Island where they stayed overnight. The next day Mrs. Cook and Mrs. Polly proceeded to Greeley and Mrs. Hughes went to her home at Burwell.

A few days later Mrs. Polly requested that a lawyer come to see her at Mrs. Cook's home. The lawyer complied with this request. He and Mrs. Polly went into a little apartment that Mrs. Polly was occupying. As a result of a conversation with the lawyer, Mrs. Cook was appointed conservator of the property belonging to Mrs. Polly on September 30, 1959.

Thereafter, in the lawyer's office another will was drawn. The lawyer and his wife signed this will as attesting witnesses, and this is the will in controversy here. This will provides in substance that Emmett Hughes receive an undivided one-tenth of the property of the testatrix; $100 is bequeathed to James Booth; and all the rest and residue of the property, real, personal, and mixed, is bequeathed to Mable Cook, a daughter of a deceased sister of the testatrix. The will also stated

that the testatrix well realized that she had a living sister and numerous other relatives, but it was her wish that none of them should take under this will, and that the testatrix had not forgotten them but intentionally omitted them from any share of her estate. This will was prepared and executed on October 16, 1959. This will, which was signed "Mrs. Retta Polly" for the reason that Mrs. Polly said she signed her name that way, was signed in the lawyer's office. There is testimony by the wife of the attorney who prepared the will to the effect that at the time Mrs. Polly signed this will she was competent to make a will and that she said that was the way she wanted her property disposed of.

Mrs. Cook gave as her opinion that Mrs. Polly was competent to make a will on October 16, 1959, and testified that she never had any discussion with Mrs. Polly about the disposition of her property.

On cross-examination Mrs. Cook said she had not seen her aunt, Mrs. Polly, for possibly 27 years; that she received $100 a month for her aunt's board and room; and that there were other expenses besides that amount for such things as drug and doctor bills.

A doctor testified that he first met Mrs. Polly on November 15, 1959, at Mrs. Cook's home, and consulted with her. At that time Mrs. Polly asked Mrs. Cook to leave, and said she wanted to consult privately with the doctor. The doctor consulted with Mrs. Polly for 10 or 15 minutes. He next saw her on January 5, 1960, at Mrs. Cook's home and talked to her privately for 10 or 15 minutes. He testified that there was nothing unusual about Mrs. Polly's mental condition, that she was normal and physically well preserved for her age, and could carry on her own business.

Another doctor testified by deposition that he had known Mrs. Polly as a patient from May 1960, until her death on January 26, 1961; that he attended her at his office eight times and at the hospital on three occasions; and that her complaints were of a urinary tract dis-

order, lung difficulty, and throat trouble. The doctor gave as his opinion that Mrs. Polly was showing some signs of senility; however, considering her age, he felt she was quite alert, attentive, and capable of forming an opinion. She was independent, and agreed with things she liked and not with things she disliked. The doctor further testified that in November 1960, following physical complications, there was a definite decrease in her mental agility. On cross-examination this witness testified that Mrs. Cook always came to the office with Mrs. Polly; that sometimes Mrs. Cook would come into the office and sometimes not; and that his conversations with Mrs. Polly were mostly about her illness.

Mrs. Emmett Hughes testified that she had corresponded with Mrs. Polly for at least 18 years. As a result of this correspondence, she decided to go to Scottsbluff because she had received mail from Mrs. Polly stating that she was in the hospital and wanted to see Mrs. Hughes. She went to Scottsbluff, visited Mrs. Polly, and stayed, as heretofore set out in the evidence adduced by Mrs. Cook. In October 1959, she visited Mrs. Polly at the Cook home. At that time Mrs. Polly seemed pretty alert, and part of the time she seemed to be satisfied and then acted as though she was not satisfied. She next saw Mrs. Polly on November 8, 1959, because she and her husband had been hearing that Mrs. Polly wanted them to come and see her and take her away from the Cook home. When they saw Mrs. Polly she said she wanted to go, but she wanted to see her banker and her lawyer before she left, and she asked them to come back in the middle of the week and she would be ready to go home with them. This witness further testified that she saw Mrs. Polly in the latter part of December 1959. At that time Mrs. Polly wanted Mrs. Hughes and her husband to take her away, to get her an attorney, and get her out of the Cook home, and she stated that she was a prisoner in her own apartment; that the doors were all locked and she could not go in or

out as she pleased; and that she did not get to see anybody. This witness further testified that she had a conversation with Mrs. Cook who told this witness that Mrs. Polly could not go because Mrs. Cook was her conservator and Mrs. Polly would have to stay with her at all times. The same conversation occurred a couple of times. On one occasion Mrs. Polly put on her coat and got as far as the car to go home with this witness and her husband, but she was not allowed to go. The Cooks moved to Grand Island on September 10, 1960. Mrs. Hughes further testified that they received a letter from Mrs. Cook from Grand Island. They never saw Mrs. Polly in Grand Island, but did talk to her over the telephone. Mrs. Polly wanted to leave there, and Mrs. Hughes said: "Aunt Rett, are you satisfied or do you want us to get you out of there?" She heard another voice on the telephone talking to Mrs. Polly and recognized the voice as that of Mrs. Cook who told Mrs. Polly to say yes she was satisfied. Mrs. Hughes asked Mrs. Polly if she still wanted them to get her attorney, and Mrs. Cook told Mrs. Polly to say no. Thereafter Mrs. Hughes and her husband were unable to contact Mrs. Polly. They called the hospital and were told that Mrs. Polly had been left at the hospital with instructions that no visitors were to be allowed. Mrs. Hughes further testified that the last time she was at the Cook home to see Mrs. Polly, Mrs. Polly wanted to go home with her and her husband, and tried to get into the car, but Mrs. Cook said she had to iron, and took Mrs. Polly back into the house.

Emmett Hughes testified that Mrs. Polly told him when they were in her apartment that she needed help; that she didn't want to stay with Mrs. Cook any more; that she did not have any money and did not know where her money was; that she wanted to get an attorney; and that she wanted to go home with him. She went to his pickup truck, but Mrs. Cook told her she could not go as they had a date with the doctor the next day. Con-

sequently, this witness did not take Mrs. Polly with him.

Bertha Hamilton testified that she visited Mrs. Polly in May 1960, and Mrs. Polly told this witness that she had made a will in Scottsbluff, and that all of her nephews and nieces and the children of this witness were named in the will. The daughter of this witness was present at the time her mother had a conversation with Mrs. Polly about the execution of the will in Scottsbluff, and corroborated her mother's testimony as above stated.

Donna Ketchmark testified that she had a conversation with Mrs. Polly, her aunt. She was visiting her aunt and wanted to leave, but Mrs. Polly wanted to talk to her. When this witness tried to depart, Mrs. Polly jumped up real quick and said: "Oh, Donna, get me out of here, get me away from these people." This witness said: "Aunt Rett, I don't like to talk about things in here, could you come someplace else, and she said, they won't let me leave the house." Mrs. Polly tried to go home with this witness, but she was not permitted to do so. Mrs. Polly told this witness she wanted a lawyer, and that she wanted to go to Scottsbluff. This witness testified that Mrs. Polly did not seem to know where she was or what house she was in. On one occasion Mrs. Polly went for a walk with this witness. At that time Mrs. Polly said that she was tired of that woman (meaning Mrs. Cook) telling her what to do; that she wanted to go home with this witness; and that she wanted a pickup truck and an attorney. She said: "Oh, Donna, I am afraid it is too late. * * * I am afraid they got my money * * * we have got this money back here and I could have a trust deed because if I signed any papers to get my money back here, I did not know what I was doing, * * *." This witness further testified that she had difficulty in getting Mrs. Polly to return to the Cook home. On another occasion Mrs. Polly objected to being watched by persons around the Cook home, stated she was unable to carry on a conversation in private with

any person, and asked this witness to take her away from the Cook home. She told this witness to drive up the street with her automobile and she would come out. At that time Mrs. Cook did not want Mrs. Polly to come out, but she did. Mr. Cook came out with his cane and ordered this witness off. This witness said she could talk to her aunt on the street, and Mr. Cook said that he would get the law.

Mrs. Cook testified on rebuttal that Mrs. Ketchmark angered her; that she opened the door and Mrs. Ketchmark pushed Mrs. Cook aside and said she wanted to talk to her Aunt Rett; that she used bad language and talked loud; and that Mr. Cook told her that if she didn't use different language she could leave and she said she would leave when she got ready. Mrs. Cook further testified that Mrs. Polly was upset by this incident.

There is evidence on the part of Mr. and Mrs. Boyd McKenzie to the effect that they were acquainted with Mrs. Polly and visited her quite often in Scottsbluff. They took her to and from church and did other favors for her. They were friendly with her and liked her very much. Mrs. Polly called on them several times for certain things that she would like to have done, and they complied with her requests.

As heretofore set out, there is evidence to the effect that Mrs. Polly was not permitted to be with any of her other relatives for any period of time without being observed by Mrs. Cook or members of her family; that on at least two occasions she requested the services of an attorney to help her get out of the Cook home because she was being dominated by Mrs. Cook and was under her control; and that in the spring of 1960, according to the testimony of Mrs. Hamilton and her daughter Mrs. Peterson, Mrs. Polly stated that she had remembered her nephews and nieces in her will, meaning the will that was executed at Scottsbluff. There is evidence that in this will she included two friends of

hers living in Gering who had done many favors for her for a period of 5 or 6 years and who were eliminated from the will here in controversy. There is evidence that Mrs. Cook was practically a stranger to her aunt, Mrs. Polly, and was appointed conservator of her property within a few days after Mrs. Polly arrived at the Cook home, and then 16 days thereafter Mrs. Polly executed the will here in controversy.

The evidence in its entirety was for the jury to consider on the issue of undue influence.

The proponent predicates error on the trial court giving instruction No. 12. This instruction is as follows: "In a will contest, the fact that a will is unnatural, unreasonable or unjust in distribution of testator's property is a circumstance to be considered by jury in connection with other evidence bearing on question whether the will is the result of undue influence."

Under the evidence and the circumstances developed in this case, we conclude that this instruction is not prejudicially erroneous.

The proponent contends that there was abuse of discretion on the part of the trial court when he addressed the jury and then questioned Emmett Hughes. No objections were made by the proponent to the questioning of this witness by the trial court at any time. The questions propounded to this witness were to the effect that he was not contesting this will and had no interest in the outcome of this case. We find no prejudicial error as contended for by the proponent.

The proponent contends that the trial court committed error in not permitting a witness to testify to a conversation when an attorney was present. On direct examination Roy Hughes stated that while he and other of the contestants were in Grand Island with Mrs. Cook and Mrs. Polly at the home of Mrs. Cook's daughter, Mrs. Polly made the remark: "I need help, get me out of here." Mrs. Cook testified on rebuttal that after they were there Mrs. Polly asked to contact her attorney

and did so by telephone, and as a result her attorney came to Grand Island a day or two later and had a conversation with Mrs. Polly in the presence of Mrs. Cook. The trial court sustained objection to this conversation on the grounds that it was a privileged communication between the client and attorney.

In Short v. Kleppinger, 163 Neb. 729, 81 N. W. 2d 182, the court said: "Communications between attorney and client made in the presence of others do not constitute privileged communications within the meaning of sections 25-1201 and 25-1206, R. R. S. 1943. It is only communications which are confidential that are protected."

The proponent made no offer of proof as to what the conversation was.

This court has held in Bland v. Fox, 172 Neb. 662, 111 N. W. 2d 537: "When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof of the facts sought to be put in evidence by the question in order to present the ruling to this court for review."

We believe the contention of the proponent is without merit. In any event, there was no prejudicial error in the ruling of the trial court on this evidence.

In the light of the evidence and the authorities heretofore cited, we conclude that the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

THOMAS R. KARPISEK ET AL., APPELLEES, V. CATHER & SONS CONSTRUCTION, INC., ET AL., APPELLANTS.
117 N. W. 2d 322

Filed October 12, 1962. No. 35245.

1. **Appeal and Error.** While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining

the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

2. Nuisances. Where one's business operation as conducted materially and injuriously affects the comfort and enjoyment and property rights of those in the vicinity it becomes a nuisance and may be enjoined.
3. ———. If a private person suffers special and peculiar damage to himself and independent of any damage sustained by the public at large, a court of equity will grant him relief by injunction.
4. ———. In order for a private individual to maintain an injunction suit to abate a public nuisance the injuries sustained by the plaintiff must differ not merely in degree but in kind from those suffered by the members of the community.
5. ———. The number of the persons who are specially injured by a nuisance does not affect the right of action for such injury or make their injury identical with that of the public at large, but any of such persons may maintain an action for the nuisance; and the fact that several persons join in a suit to abate a public nuisance does not show that each of them may not have sustained such special injury as entitles him to relief.
6. ———. It is proper to take into consideration all the injuries and losses caused by the nuisance, such as the depreciation in the market or rental value of plaintiffs' property, the discomfort, annoyance, and inconvenience in the use thereof.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed as modified.

Charles W. Phillips and Lawrence E. Murphy, for appellants.

Davis, Thone, Bailey & Polsky, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This is a suit in equity brought by the plaintiffs Thomas R. Karpisek and Clara A. Karpisek, who are husband and wife, against the defendants Cather & Sons Construction, Inc., and Robert H. Cather, Howard J. Cather, and Howard B. Cather, individually and jointly, in the district court for Lancaster County, to enjoin

them from operating an asphalt plant, and for damages.

Plaintiffs' petition alleges they own two residential properties in Havelock, now Lincoln, Lancaster County, Nebraska, described as Lot 11, Block 39, and Lot 2, Block 66 therein; that Cather & Sons Construction, Inc., is a corporation of which Howard B. Cather is president, Howard J. Cather is vice president, and Robert H. Cather is secretary-treasurer; that the individual defendants are the owners of Block 37, Havelock, in said city of Lincoln on which the asphalt plant is situated and in its operation all the defendants are individually and jointly interested. It sets out that the plant is located approximately 300 feet from plaintiffs' premises; that operations commenced in the spring of 1960 and except in winter it is run during certain parts of the week, and that while operating it emits large amounts of dust, silicon dioxide, and residue which contaminates and pollutes the air around plaintiffs' residence, causing annoyance and damage in several respects pleaded, and which are mentioned hereafter in the discussion of the evidence. It alleges this constitutes a nuisance. The petition prays for damages to plaintiffs' property and that the nuisance be enjoined.

Defendants' answer admits that the individual defendants own the real estate upon which the asphalt plant is located, are officers of the defendant corporation, and that all the defendants have an interest in the operation of the plant. They allege that the plant is located in an industrial area and that it was not operated so as to constitute a nuisance. The rest of the answer is in effect a general denial.

A trial was had in the district court which resulted in a judgment for $150 damages and a permanent injunction enjoining the defendants from operating said plant in such a manner that particles of sand, silicon, or other material coming from the operation are carried onto any part of the plaintiffs' premises.

From an order overruling their motion for a new

trial, the defendants have appealed to this court.

Defendants assign as error, so far as necessary to the determination of the matters presented, that the trial court erred in finding for plaintiffs contrary to the law and the evidence; in finding the plaintiffs to have been damaged in the sum of $150; in finding defendants' acts constituted a nuisance, for which plaintiffs were entitled to injunctive relief; and in finding that when the wind was from the south, southwest, or southeast, particles of gravel and silicon were carried into the atmosphere surrounding plaintiffs' properties.

An examination of the evidence discloses that the defendants' plant is erected on their land directly south of the Burlington Railroad tracks. It is zoned for industrial purposes only. South and east of their premises is an area zoned for residential, school, church, park, and playground purposes where plaintiffs' property is located. Plaintiffs' residential property is about 300 feet south of the asphalt plant facing south on Morrill Street which is paved. Their other premises directly across Morrill Street to the south and facing north are rented.

Manufacture of asphalt requires the asphalt to be mixed with crushed gravel. The gravel is piled on the premises near the plant. The asphalt is heated to a temperature between 270° and 315°. The gravel is then lifted up and tumbled through a dryer which heats it to 300° or 350°. There is an exhaust stack leading from the dryer. A fan located in it pulls off the dust and steam that is taken from the gravel in drying. Some sand must be added to the mixture as a stabilizer. After going through the dryer the aggregate goes through a bin where it is measured and drops into a mixer containing hot asphalt. It is then placed in trucks and hauled away.

Defendants maintain, and introduced evidence tending to show, that dust from unpaved streets and parking lots in the locality surrounding the plaintiffs' prem-

ises, and not the asphalt plant, caused the pollution of the air over the plaintiffs' property. They claim it was colored differently than any emission from the plant. However, it plainly appears that when the defendants' plant started operations in the spring of 1959, there were dust problems. From the stack, and to a certain extent from the two ends of the dryer, dust escaped. This arose in part because of the softness of the mix. At any rate too much dust was escaping.

In May 1961, after complaints had been made from the neighboring householders, a cyclone dust collector was added and in August 1961, a wet wash dust collector was installed.

Before the installation of the wet wash dust collector, plaintiffs' suit was started in June 1961. Although there is some conflict and dispute in the evidence, it seems clearly to substantiate that previously to that time dust settled over a considerable portion of the residential district within at least 2 or 3 blocks of the defendants' asphalt plant. It covered the yards with dust to an extent that plaintiffs could not use the out-of-doors and it was annoying if they attempted to do so. On sweeping a porch or walk an accumulation of a considerable quantity of dust could be obtained. A witness testified he was ashamed to have visitors. It infiltrated their homes and clothing, and settled on the floors, bedding, furniture, and rugs. Windows had to be kept closed. The washings hanging on the line were soiled and cars which were washed had to be rewashed. Buildings that were painted had sand blown on them. The sides of other homes had to be scrubbed because the substance was sticky. Children couldn't play out-of-doors. Their eyes teared and became red and burned. It irritated their throats. A complaint was filed on May 15, 1961, against the defendant corporation in the municipal court of Lincoln for the operation of its plant because of the emission of dust and silica detrimental to public health constituting a public nuisance. On the

trial it was found guilty and fined $100 and costs. The matter was appealed to the district court but when this case was tried the fine had been paid by the company.

After the installation of both the cyclone-type dust collector and water wash, which was procured at a cost of approximately $6,000, the testimony is in irreconcilable conflict as to whether the plant continued to discharge the substances. The defendants' witnesses, including experts on air pollution and the individual defendants and employees, testified the discharge was eliminated. The witnesses for the plaintiffs, however, stated that though there was an improvement it was still quite annoying. An expert for defendants testified he could feel particles hitting his eyes when 50 to 75 feet from the plant. Others living at a greater distance from the plant stated they were still bothered by the same material which got onto their washing and covered the tops of the cars. One said he washed his car and had to do it over again because of it. A newly painted board exposed for a short period had fine particles collected thereon which the plaintiffs' witness testified came from the plant.

In this action the trial court heard and observed the witnesses and its decision indicates it placed credence on the testimony of the plaintiffs' witnesses with respect to the continuance of the discharge of the annoying substance from defendants' plant. "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." Olson v. Fedde, 171 Neb. 704, 107 N. W. 2d 663.

Because the evidence is so conflicting and irrecon-

cilable in this particular, this court is constrained to follow the decision of the trial court holding that the condition continued even after the installation of the devices to alleviate it.

The plaintiffs' evidence clearly shows the comfort and enjoyment of their own premises have been substantially interfered with. Where one's business operation as conducted materially and injuriously affects the comfort and enjoyment and property rights of those in the vicinity it becomes a nuisance and may be enjoined. Sarraillon v. Stevenson, 153 Neb. 182, 43 N. W. 2d 509, 18 A. L. R. 2d 1025.

The operation of an asphalt plant was held in City of Omaha v. Hugh Murphy Construction Co., 114 Neb. 573, 208 N. W. 667, to constitute a nuisance and its continued operation under conditions much as disclosed here was in that case enjoined. In that case the action was maintained by the city of Omaha.

The defendants in the case before us maintain that in the instant case the action is brought by a private individual; that the nuisance complained of is a public one; and that a private individual cannot maintain the action in such a case. Under the evidence in this case if it be conceded without deciding that the nuisance is a public one, this court has repeatedly held in such cases that if a private person suffers special and peculiar damage to himself and independent of any damage sustained by the public at large, a court of equity will grant him relief by injunction. Michelsen v. Dwyer, 158 Neb. 427, 63 N. W. 2d 513.

Defendants assert that this rule does not apply to the instant case because of the past decisions of this court. They cite to this effect Ayers v. Citizens Ry. Co., 83 Neb. 26, 118 N. W. 1066, Schroder v. City of Lincoln, 155 Neb. 599, 52 N. W. 2d 808, and other cases holding that in order for a private individual to maintain an injunction suit to abate a public nuisance the injuries sustained by the plaintiff must differ not merely in

degree but in kind from those suffered by the members of the community.

The defendants' argument in this respect seems to be that the residents of the homes and buildings within a radius of several blocks of defendants' plant have suffered the same annoyance and interference with their property as the plaintiffs. They claim the only difference is that those whose premises are closer to the alleged nuisance have suffered more in degree and those further in a lesser degree only. This argument we cannot accept. Patently much of the larger community, including portions of the area shown on the photographs introduced by the defendants, suffered nothing whatever from the material emitted from defendants' plant. That more than one, or in fact a considerable number closer to it, had the use and enjoyment of their property curtailed and restricted in the manner described does not mean that each of them have not received injury which differed in kind and not merely in degree from the community generally. If the holding urged were the rule, any nuisance affecting more than a small part of a community would have to be borne without injunctive remedy on behalf of those materially injured unless the public authorities act. "The number of the persons who are specially injured by a nuisance does not affect the right of action for such injury or make their injury identical with that of the public at large, but any of such persons may maintain an action for the nuisance; and the fact that several persons join in a suit to abate a public nuisance does not show that each of them may not have sustained such special injury as entitles him to relief." 66 C. J. S., Nuisances, § 79, p. 835.

We conclude the operation of the defendants' plant constituted a nuisance and that the plaintiffs suffered special injury from that operation which was peculiar to them and different in kind from that sustained by the public at large. Under the circumstances the plain-

tiffs could properly bring the action, and the trial court's judgment granting the injunction was proper. It is to be noted it did not enjoin the operation of the plant if it could be run without particles of sand, silicon, or other materials being carried onto any part of plaintiffs' premises.

Defendants' assignment of error that the damages were improperly allowed is without merit. The plaintiffs both testified that the annoyance and inconvenience hitherto set out affected them and their family and that of their tenant. The dust penetrated and settled on everything in their yards. Thomas Karpisek said at times it was one-sixteenth of an inch deep. He stated he painted his home and it settled on the paint and he was only able to get a portion of it off. Plaintiffs' rental property across from the home was bought in October 1960. Since then it was rented for $75 and but for debris from defendants' plant could have rented for $90. He stated his home property had depreciated in value several thousand dollars. The damages allowed were adequately proved and are in fact quite nominal. It is proper to take into consideration all the injuries and losses caused by the nuisance, such as the depreciation in the market or rental value of plaintiffs' property, and the discomfort, annoyance, and inconvenience in the use thereof. 66 C. J. S., Nuisances, § 170, p. 974. See, also, Walling v. City of Fremont, 138 Neb. 399, 293 N. W. 226.

The defendants assign as error that the trial court in its findings found that when the wind is from the "south, southwest, or southeast" particles of gravel and silicon were carried onto the plaintiffs' premises. An examination of the evidence discloses that the plaintiffs testified that their premises were subject to the debris when the wind was from the "north, northwest, or northeast" instead of a southerly direction. The testimony of other witnesses whose premises were northerly from the plant was to the effect they and not the plaintiffs were bothered by the southerly winds. The evi-

dence however clearly shows the injunction granted was justified and that the direction of the wind which caused the silicon to be carried onto the plaintiffs' premises was erroneously recited in the judgment. The other findings justified the judgment in any event. This case having been tried here de novo, the record in that respect, however, should be corrected.

In all other respects the judgment should be affirmed. The costs should be borne by the appellants.

AFFIRMED AS MODIFIED.

SKY HARBOR AIR SERVICE, A CO-PARTNERSHIP, ET AL., APPELLANTS, V. AIRPORT AUTHORITY OF THE CITY OF OMAHA, APPELLEE.
117 N. W. 2d 383

Filed October 19, 1962. No. 35178.

1. **Landlord and Tenant.** In the absence of an express covenant or stipulation a lessor is not bound to make repairs to leased property.
2. **Contracts.** The meaning of a doubtful word may be ascertained by reference to the meaning of the words associated with it.
3. ———. General and specific words, capable of analogous meaning, when used together, take color from each other so that general words are restricted to a sense analogous to the less general.
4. ———. A practical construction put upon a contract by the parties cannot control the express, unambiguous provisions of the instrument.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Shrout & Foley, for appellants.

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, and Frederick S. Geihs, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is a proceeding under the Declaratory Judgments Act for the construction and interpretation of a written lease. The plaintiffs are Sky Harbor Air Service, a partnership, and Robert E. O'Connor, its receiver. The defendant is the Airport Authority of the City of Omaha, Nebraska.

The defendant has the control and management of Eppley Airfield. Sky Harbor Air Service is engaged in a general aviation business at Eppley Airfield. It conducts a business described as a fixed base operation upon property leased from the defendant. As such it sells airplanes, parts, and gasoline; stores and repairs airplanes; teaches flying; runs a charter service; and does everything generally in the aviation business except manufacturing.

The lease in question was executed on March 9, 1956, by the city of Omaha as lessor and Sky Harbor Air Service as lessee. In 1959 the defendant succeeded to the rights and obligations of the city under the lease. On June 21, 1961, Robert E. O'Connor was appointed receiver for Sky Harbor Air Service which had been dissolved as of March 31, 1961, by a judgment of the district court for Douglas County, Nebraska.

The controversy between the parties concerns the liability for repairs to the buildings and ramps upon the leased property. The buildings involved are an office building and two hangar buildings. The ramps are the grounds adjacent to the buildings which have been surfaced with a thin asphalt coating. The repairs which became necessary were the result of the normal exposure of the property to the weather. The district court held that it was the duty of the lessor to replace or repair damage by the elements only where the action of the elements was sudden, unexpected, or unusual and that the plaintiffs were liable for the repairs in question. The plaintiffs' motion for new trial was overruled and they have appealed.

In the absence of an express covenant or stipulation a lessor is not bound to make repairs to leased property. Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648. Thus, the question is whether the lessor assumed the duty that otherwise rested upon the lessee.

The lease in question contained the following provisions:

Article III, paragraph 1: "Lessee agrees, at its own expense, to cause the lands demised to be maintained in a presentable condition consistent with good business practice."

Article III, paragraph 8: "Lessee agrees, at its own expense, to cause to be kept and maintained all structures on the leased premises in good repair during the term hereof except as provided for in Article V, paragraph 8."

Article V, paragraph 8: "Lessor shall replace or repair any land, building or structure totally or partially damaged by fire, the elements, floods, tornadoes, or any other casualty of any kind whatsoever, or by any act of a public enemy, or by any act of God. In connection herewith, Lessor covenants to carry fire insurance and other necessary insurance. In the event that the lands demised, or any or all of the structures or buildings thereon, become untenantable for any reason, or in the event that the airport is rendered unusable to Lessee because of conditions thereof, for any reason, the Lessee shall not be liable for any rental during the period which said land, structure, or building is untenantable, or said airport is unusable."

The plaintiffs concede that paragraphs 1 and 8 of Article III place a general duty of maintenance and repair upon the lessee, but contend that paragraph 8 of Article V creates an exception with respect to any damage caused by the elements. The plaintiffs construe paragraph 8 of Article V to be a covenant by the lessor to assume the duty of maintenance and repair of all damage caused by the natural forces of nature, ordi-

nary as well as extraordinary. The effect of such a construction would be substantially to nullify the obligation of the lessee to keep and maintain all structures in good repair because most of the repairs that become necessary are the result of the action of the weather upon the property.

Unless otherwise qualified, paragraphs 1 and 8 of Article III place the duty of maintenance and repair of all damage, including that resulting from fire, acts of God, floods, tornadoes, and similar unusual occurrences, upon the lessee. We think that the purpose of the first sentence of paragraph 8 of Article V is to relieve the lessee from the burden of repairing the damage resulting from such unusual occurrences and not to excuse the lessee from the burden of repairs made necessary by the normal action of the weather upon the property. See 32 Am. Jur., Landlord and Tenant, § 795, p. 678.

The word "elements" is used with fire, floods, tornadoes, acts of a public enemy, and acts of God. The meaning of a doubtful word may be ascertained by reference to the meaning of the words associated with it. Behrens v. State, 140 Neb. 671, 1 N. W. 2d 289. General and specific words, capable of analogous meaning, when used together, take color from each other so that general words are restricted to a sense analogous to the less general. O'Gara Coal Co. v. Chicago, M. & St. P. Ry. Co., 114 Neb. 584, 208 N. W. 742. Thus, "elements" as used in paragraph 8 of Article V of the lease refers to a sudden, unexpected, or unusual action of the elements.

The plaintiffs produced evidence showing that before the defendant assumed control of Eppley Airfield, the lessor maintained and repaired the buildings and ramps at its expense. The plaintiffs contend that this evidence established a practical construction of the lease by the parties and that it is binding upon the defendant.

The interpretation or construction of an indefinite or ambiguous contract by the parties may be shown, but

a practical construction put upon a contract by the parties cannot control the express, unambiguous provisions of the instrument itself. James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273. The lease in question in this case is not so indefinite or ambiguous that a practical construction by the parties is controlling.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

LAURA OMEY, APPELLEE, V. LEROY G. STAUFFER ET AL., APPELLANTS.
117 N. W. 2d 481

Filed October 19, 1962. No. 35229.

1. **Trial: Appeal and Error.** A failure to instruct the jury upon the issues presented by the pleadings and evidence, whether requested to do so or not, is prejudicial error.
2. ———: ———. Instructions which are inconsistent and tend to mislead and confuse the jury are erroneous and prejudicial.
3. ———: ———. An instruction on the burden of proof which fails to inform the jury as to what its verdict should be in the event the evidence is equally balanced or preponderates in favor of the defendant is prejudicially erroneous.
4. **Automobiles: Municipal Corporations.** A municipal ordinance which decreases the speed limit from that otherwise prescribed by statute is effective only when appropriate signs giving notice thereof have been erected. § 39-7,108, R. R. S. 1943.
5. **Automobiles: Trial.** An instruction relating to the duty to give an appropriate signal before turning a motor vehicle from a direct course upon a highway is incomplete if it fails to instruct as to the signals which are authorized and required.
6. **Trial: Appeal and Error.** The giving of an oral instruction to the jury in regard to the principles of law applicable to the case and to the evidence, without a waiver of the statutory requirement that it be in writing, is reversible error.
7. **Infants.** The guardian ad litem of an infant litigant is entitled to an allowance of reasonable compensation for his services to be taxed as costs.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Munro, Parker & Munro, C. Morris Gillespie, and Baylor, Evnen, Baylor & Urbom, for appellants.

Richard A. Dier, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

The plaintiff, Laura Omey, commenced this action against the defendants, LeRoy G. Stauffer and Henry C. Lubeck, to recover damages resulting from injuries which she received when she was struck by an automobile operated by Stauffer. The jury returned a verdict in favor of the plaintiff and against both defendants. Their motions for new trial were overruled and both defendants have appealed.

The accident happened on December 28, 1960, in Kearney, Nebraska, near the intersection of Twenty-fifth Street and Avenue I. The plaintiff was walking to the west on the sidewalk on the north side of Twenty-fifth Street. The defendants were both driving east on Twenty-fifth Street. Twenty-fifth Street is a four-lane arterial street and is U. S. Highway No. 30 at the place where the accident happened. Between intersections the eastbound traffic lanes are separated from the westbound traffic lanes by a concrete median strip. Most of the surface of the street was icy and covered with packed snow.

Lubeck intended to stop at a place of business on the north side of Twenty-fifth Street and made a left turn at the intersection of Avenue I. Stauffer, who was behind the Lubeck automobile, turned to the left to avoid a collision with the Lubeck automobile. Stauffer lost control of the automobile he was operating. It slid through the intersection, across Twenty-fifth Street, and onto the sidewalk where it struck the plaintiff who was

a pedestrian. The plaintiff was struck at a point approximately 200 feet east of the intersection.

From our examination of the record we have determined that the judgment must be reversed and the cause remanded for a new trial. For that reason, only those errors assigned which require a reversal or which are likely to occur upon the retrial are discussed in this opinion.

The defendants' principal assignments of error relate to instruction No. 1 which was as follows:

"You are instructed in this case to return a verdict for the plaintiff, Laura Omey, for the damages she sustained in the accident of December 28th, 1960, when she was struck by a car driven by the defendant Leroy G. Stauffer.

"You have two duties in this case. The first is to fix the liability upon either the defendant Leroy G. Stauffer individually, or the defendant Henry C. Lubeck individually, or upon both of them jointly. The second is to fix the amount of damages sustained by the plaintiff.

"If you find from the greater weight of the evidence that the sole proximate cause of the accident was the negligence of the defendant Leroy G. Stauffer in any one or more of the following particulars:—

"1. That the defendant Stauffer drove his car too fast for the condition of the highway,

"2. That the defendant Stauffer did not maintain a reasonable and proper lookout for either the defendant Lubeck's automobile or for said plaintiff,

"3. That the defendant Stauffer did not maintain reasonable and proper control of his car at a time when defendant Lubeck was signaling and preparing to make a left turn on 25th Street,

than (then) your verdict will be against the defendant Leroy G. Stauffer only.

"If you find from the greater weight of the evidence that the sole proximate cause of the accident was the negligence of the defendant Henry C. Lubeck in any

one or more of the following particulars:—

"1. That the defendant Lubeck made a left turn from the right lane of traffic on a four-lane street,

"2. That the defendant Lubeck failed to approach said intersection in the lane of traffic nearest to the center line before he made his left turn, contrary to the ordinances of the City of Kearney,

"3. That the defendant Lubeck turned to the left without continuously giving a signal of his intention to turn to the left for the last fifty feet his vehicle traveled before turning.

"4. That the defendant Lubeck turned his vehicle from the direct course of travel on the street when such movement could not be made with reasonable safety,

"5. That the defendant Lubeck failed to maintain a proper lookout,

then your verdict will be against the defendant Henry C. Lubeck only.

"If you find from the greater weight of the evidence that both of the defendants were guilty of one or more of the acts of negligence charged against them as set forth foregoing, which negligence combined to produce plaintiff's injuries, then the parties so concurring in such negligence and bringing about the result are jointly and severally liable for the injuries so proximately caused regardless of the degree of negligent participation of each defendant, and if you so find then your verdict must be against both the defendant Stauffer and the defendant Lubeck."

Instruction No. 1 is subject to criticism on several grounds. It does not state clearly whether proximate cause is the only issue submitted to the jury or whether the negligence of the defendants is also submitted to the jury. In this respect the instruction was confusing. By directing the jury to return a verdict for the plaintiff but at the same time instructing it that it could find for either one of the defendants, the instruction was in-

consistent. If the jury had a right to find for either defendant, then it necessarily had the right to find for both defendants but the instruction did not permit such a finding. In effect, the court instructed the jury that one or both of the defendants were guilty of negligence as a matter of law which was the proximate cause of the plaintiff's injuries, but that it was up to the jury to decide which defendant or whether both defendants were guilty of the negligence which was the proximate cause of the plaintiff's injuries. This was erroneous and prejudicial.

The trial court did not give a general instruction on the burden of proof. Instructions Nos. 1 and 8 referred to the greater weight of the evidence and that term was defined in instruction No. 2. There was no instruction as to the finding to be made if the evidence was evenly balanced or preponderated in favor of one or both defendants. An instruction on the burden of proof which fails to inform the jury as to what the verdict should be in the event the evidence is evenly balanced or preponderates in favor of the defendant is prejudicially erroneous. See, Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531; Kristufek v. Rapp, 154 Neb. 343, 47 N. W. 2d 923.

The trial court instructed the jury that an ordinance of the city of Kearney, Nebraska, established a speed limit of 35 miles per hour on Twenty-fifth Street from Avenue A to Avenue T. Complaint is made because the trial court failed to instruct the jury that the ordinance contained a further provision limiting the speed of motor vehicles to 15 miles per hour while traversing intersections.

The evidence is that the speed limit posted on Twenty-fifth Street was 35 miles per hour. Although local authorities are authorized to increase or decrease speed limitations within their respective jurisdictions from those otherwise prescribed by statute, subdivision (5) of section 39-7,108, R. R. S. 1943, provides that a de-

crease shall be effective only when appropriate signs giving notice thereof are erected. Under the circumstances of this case we think it was proper for the trial court to omit any reference to the provision of the ordinance relating to the speed limit while traversing intersections.

The trial court also instructed the jury in reference to the requirement that an appropriate signal be given before turning a vehicle from a direct course upon a highway. The court failed to instruct as to the signals which are authorized and required by the statute. See §§ 39-7,115, 39-7,116, and 39-7,117, R. R. S. 1943. In the absence of an instruction as to the signals which are authorized and required by the statute, the jury would be unable to make an intelligent finding as to whether there had been a compliance with the statute.

The trial court submitted three forms of verdict to the jury. One form permitted a finding as against the defendant Stauffer only. A second form permitted a finding as against the defendant Lubeck only. A third form permitted a finding as against both defendants. Apparently the jury was not satisfied with the forms of verdict which were submitted because some of the members of the jury wanted to fix the damages as between each defendant.

A statement dictated into the record by the district judge at the hearing upon the motions for new trial shows that the jury during its deliberations twice requested a different form of verdict. On each occasion the trial court orally informed the jury that the form of verdict which had been requested could not be given to it. On one occasion the trial court told the jurors that they had deliberated for 6 hours, that they should try to arrive at a verdict, and that they were as capable as anyone else of making a decision in the matter. The above took place at the door of the jury room with the trial court standing in the courtroom and the jury in

the jury room. It took place out of the presence of the parties, their attorneys, and the court reporter.

Our statute requires that all instructions to the jury be in writing unless the requirement is waived in open court. § 25-1111, R. R. S. 1943. The statute further provides that no oral explanation of any instruction shall be allowed. § 25-1115, R. R. S. 1943. In Dow v. Legg, 120 Neb. 271, 231 N. W. 747, 74 A. L. R. 5, the jury had been furnished two forms of verdict, one permitting a finding against one defendant and the second permitting a finding against both defendants. During its deliberations, the jury requested permission to apportion the damages as between the two defendants. Out of the presence of the defendant who appealed, or his counsel, but in the presence of the court reporter, the trial court advised the jury that if it found against both defendants it could not apportion the damages. This court held that the remarks of the trial court amounted to an oral instruction which was prohibited by the statute and was reversible error. See, also, Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59, in which it was held that an oral instruction to the jury out of the presence of the parties or their attorneys as to the manner of preparing a verdict, as to the intent of the court as to the content of a form of a verdict in blank supplied, and the effect of it with the blank or blanks filled out and returned by the jury was reversible error.

The defendants complain that instruction No. 9 was erroneous in that it permitted the plaintiff to recover an amount greater than her actual loss. The instruction permitted the plaintiff to recover the difference between the amount she would have been able to earn if she had not been injured and the amount she will be able to earn in the future. The defendants argue that the amount which the plaintiff actually earned since the accident should be excluded from the amount which the jury might find that the plaintiff will be able to earn. Although the amount involved was relatively small, the

instruction should have been worded so that any recovery was limited to the loss sustained.

The trial court appointed Robert A. Munro as guardian ad litem for the defendant Stauffer who is a minor 16 years of age. After the trial had concluded, the guardian ad litem made an oral application in open court for an allowance of fees as compensation for his services as guardian ad litem. After hearing evidence in support of the application the trial court made no allowance of fees to the guardian ad litem.

The appointment of a guardian ad litem in this case was proper. The statute provides that the defense of an infant must be by a guardian for the suit. § 25-309, R. R. S. 1943. It is the duty of every attorney to act as the guardian of an infant defendant when appointed by the court and as such he is entitled to such compensation as the court shall deem reasonable. § 7-113, R. R. S. 1943.

The matter of the appointment and the compensation of a guardian ad litem for a minor defendant in a case such as this is discussed fully in the opinion of this court in Peterson v. Skiles, 173 Neb. 470, 113 N. W. 2d 628. The trial court was in error in not allowing reasonable compensation for the guardian ad litem in this case to be taxed as costs.

The judgment of the district court is reversed and the cause remanded for a new trial and for further proceedings in conformity to this opinion. The guardian ad litem is allowed a fee of $200 for his services in this court to be taxed as a part of the costs.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. CARL NORWOOD, APPELLANT.

117 N. W. 2d 373

Filed October 19, 1962. No. 35257.

Appeal and Error. Under the provisions of section 29-611, R. R. S. 1943, there are no exceptions to the right of appeal provided for therein where the appeal is taken within the time and in the manner and form required in the statute.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Reversed and remanded.

William G. Line, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SIMMONS, C. J.

This is an appeal from an order of the district court dismissing an appeal from the county court in a misdemeanor case.

We reverse the judgment of the district court and remand the cause.

The cause is here on a transcript.

The difficulty here is that the transcript does not present the record upon which the appellant and appellee rely.

The transcript shows that the defendant was complained against in county court for driving a motor vehicle while under the influence of alcoholic liquor, which allegedly occurred on July 4, 1961. There was also an allegation that it was a second offense. Complaint was filed July 7, 1961. July 7, 1961, defendant filed an appearance bond. July 18, 1961, defendant filed a request for trial by jury. August 16, 1961, the county attorney selected a jury. August 18, 1961, the matter came on for trial on a plea of not guilty. The same

day, the jury brought in a verdict of guilty. The matter was then continued to August 22, 1961, "for determination of prior offenses." The court found the defendant was guilty of a prior offense. Defendant was sentenced to 5 days in jail, his driver's license suspended for 1 year, and that he pay a fine of $300 and costs "and stand committed until said fine and costs are paid and said sentence is served." A mittimus was issued and delivered to the sheriff.

August 28, 1961, defendant gave notice of appeal and appeal bond was fixed and furnished in the sum of $500.

The county judge certified that the above was a true and correct record "of all proceedings had and done" in the action. He "transmitted" seven exhibits which he certified were all the original papers in the action. They do not appear in the transcript.

The State moved for a dismissal of the appeal for four reasons. It alleged (1) that defendant had been found guilty of second offense driving while under the influence of alcoholic liquor, sentenced, fined, and his driver's license suspended (this, obviously, is not a reason for dismissal); (2) that on August 22, 1961, the defendant surrendered his driver's license which was forwarded to the Department of Motor Vehicles by the county judge (nothing appears in the transcript to sustain that allegation); (3) that on August 22, 1961, defendant began serving the 5-day jail sentence which was completed on August 27, 1961; and (4) that on August 28, 1961, defendant "began laying out" the $300 fine imposed.

As to reasons (3) and (4), this record shows only a mittimus issued on August 22, 1961, and an appeal bond furnished on August 28, 1961.

On December 7, 1961, the motion came on for hearing in the district court, was submitted to the court, and sustained. It is from that order that defendant appeals.

The first assignment of error is that the court erred in considering the allegation that defendant had sur-

rendered his driver's license. On the record which we have here that assignment is sustained.

The second assignment is that the court erred in considering the allegation that defendant had served the 5-day sentence. On the record which we have here that assignment is sustained.

The third assignment is that the court erred in considering the allegation that the defendant "began laying out" the fine on August 28, 1961. The only thing the record shows here is that on that day defendant gave notice of appeal and furnished a required bond.

The defendant and the State argue the question as to whether the service of a part of a judgment in a criminal case results in a waiver of the right of an appeal.

The difficulty is that there is no record here which presents that question. For anything that appears in this record, defendant did not serve a split second in the jail of Dodge County, nor pay the costs nor any part of the fine. We see no reason for determining a question which is without a record to sustain it.

In Benson v. State, 158 Neb. 168, 62 N. W. 2d 522, 42 A. L. R. 2d 991, there was a plea of guilty and a sentence on the plea. Three days later defendant attempted an appeal when denied leave to withdraw his plea of guilty and have a trial. His motion was denied. He relied upon section 29-611, R. R. S. 1943, which is as follows: " 'The defendant shall have the right of appeal from any judgment of a magistrate, including justices of the peace, municipal judges and county judges, imposing fine or imprisonment, or both, * * *.' " We held that there were no exceptions to the right of appeal declared by the statute and that a conviction based on a plea of guilty was no bar to an appeal from the conviction. It would seem that a conviction based on a plea of not guilty should not be a bar.

We further held in Benson v. State, *supra:* "The statute granted the defendant the right of appeal if he perfected his appeal within 10 days. He did so in man-

ner and form required by statute. It follows therefore that no grounds existed for quashing the appeal."

That rule is a determination of the questions presented by this record.

The judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

LEONARD A. ANSON ET AL., APPELLEES, V. JAMES R. GRACE ET AL., APPELLANTS.
117 N. W. 2d 529

Filed October 26, 1962. No. 35173.

1. **Pleading.** Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment.
2. **Fraud.** To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby.
3. **Contracts.** The rescission of a contract must be in toto and the parties must be placed in status quo so far as the circumstances will permit.
4. ———. Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile.
5. **Tender.** However a tender may not be regarded as valid or sufficient, even if it appears that it would have been futile, unless it is made to appear that at the time the tender was made there was a present and immediate ability to make the tender good.
6. **Contracts.** Rescission by its nature implies the extinction of the contract which leaves the parties without a right of recovery on the contract itself.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Joseph C. Byrne, for appellants.

Shrout & Foley, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action by Leonard A. Anson and Christine Anson, plaintiffs and appellees, against James R. Grace and Sharon L. Grace, defendants and appellants, to strictly foreclose a written contract to sell and convey certain real estate, alleged to be in default. In the action the defendants filed an answer and counterclaim in statement of a cause of action in rescission of the real estate contract.

A trial was had to the court at the conclusion of which the cause of action of plaintiffs was sustained but strict foreclosure was denied. Instead foreclosure was adjudicated by the terms of which the defendants were granted the right to pay the balance due pursuant to the terms of the contract, and in the event of failure so to do the property was ordered sold as upon execution. The pleaded counterclaim of the defendants was dismissed.

A motion for new trial was duly filed by the defendants. This motion was overruled. From the judgment the defendants have appealed.

By the petition of the plaintiffs, to the extent necessary to state here, it was pleaded that a contract was entered into on October 15, 1959, whereby the plaintiffs sold to the defendants a certain lot with improvements thereon in Lakoma Heights in Douglas County, Nebraska, for $10,700 with payments as designated in the contract, which contract was in default. The petition was filed on December 15, 1960. The prayer was for foreclosure as indicated and the recovery of costs and disbursements.

To the petition the defendants filed what is termed "Answer and Counterclaim." In this pleading there is

no specific or general denial of the factual statement contained in the petition. In other words, there is no denial of the existence of the contract or that the payments required by its terms had not been met. This pleading was an affirmative statement of a cross action against the plaintiffs. It was filed on January 16, 1961.

By this pleading it was alleged that the contract of sale was obtained through fraud and misrepresentation made to defendants by plaintiffs as follows: That the plaintiff Leonard A. Anson was a homebuilder by occupation and that the house on the premises was constructed according to standard practices and existing specifications required by law; that the water supply for the house was located on the property and was designed, constructed, and located so as to provide a continuing supply of pure water and in accordance with standard practices and according to existing specifications required by law; and that the septic system located on the property was designed, constructed, and located so as to efficiently accommodate the sewage and waste products and according to standard practices and existing specifications required by law.

It was further pleaded that on discovery of the true conditions the defendants caused a notice of rescission to be served on the plaintiffs. A copy of this notice is attached to the pleading. It is dated November 29, 1960. This notice in pertinent part here is as follows: "You are hereby notified that the undersigned intend to and do hereby rescind the land contract entered into between yourselves and theirselves on the 15th day of October, 1959, for the purchase and sale of the following property, to-wit: * * * and that the undersigned hereby offer to reconvey such property to you and to restore everything of value which they have received from you, and to surrender the possession of said properties, and to do and perform all acts and things which might be necessary or proper in order fully to restore to you all the properties and things of value received from you, as fully

and completely as if said contract had never been made, upon the condition that you restore the moneys and things of value received as consideration for said purchase and sale, together with compensation for improvements made upon the property in reliance upon the contract."

It was alleged that the defendants converted the basement into an apartment which improvement was of the value of $1,950, and made repairs and other improvements at the cost of $449.98, the total of which was $2,399.89 (sic); that there had been paid as a down payment on the contract $2,000; that monthly payments in the amount of $909.48 had been made; that $237.33 had been paid on account of taxes; and insurance premiums in the amount of $68.26 had been paid.

The defendants prayed that the land contract be decreed to be void and rescinded; that they receive restitution of all payments made pursuant to the terms of the contract; and also that they receive the total of the money expended for the reconstruction of the basement, repairs, and improvements of the home. The total amount prayed for was $5,614.96.

It is pointed out here that neither by pleading nor evidence is it made to appear that the defendants by their notice of rescission or otherwise ever tendered back to plaintiffs the property in its condition at the time the notice was given; and likewise no offer was made to restore it to its original condition and return it.

It is true that the defendants left the premises about the time the rescission notice was given, but there is nothing to indicate that this was intended as a return or surrender of the property. The pleadings and the total effect of the evidence given by the defendants at the trial are to the contrary.

This observation at this point is deemed expedient in the determination of what was presented by the pleadings and the manner in which the case was presented for consideration at the trial.

The action, as indicated, was commenced by the filing of a petition. Also as pointed out, the defendants filed their answer and counterclaim. In that pleading there was no response to the cause of action contained in the petition. They did however set forth affirmatively a cross action the pertinent parts of which have been summarized.

Inexplicably the plaintiffs never filed any kind or character of pleading in response to this pleaded cross action. As the record stood and throughout the trial, here was an action and a cross action to neither of which was there a pleaded response. No question was raised as to this and the evidence of the parties was adduced, and the judgment rendered at the conclusion of the trial is here for review. The parties to the action obviously treated the affirmative defense to the action as denied.

The rule to be applied therefore is as follows: "Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment." Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 251. See, also, Central Constr. Co. v. Highsmith, 155 Neb. 113, 50 N. W. 2d 817; Dinkel v. Hagedorn, 156 Neb. 419, 56 N. W. 2d 464.

As pointed out there is no allegation in denial of the cause of action pleaded by the plaintiffs. This presents no problem here since the evidence of plaintiffs sustains their right to the relief prayed and granted by the decree unless that right is defeated by sufficient proof of the pleaded cross action.

In effect the plaintiffs have denied the alleged fraud and misrepresentation; they have denied that there was within the meaning of appropriate legal principles a valid rescission by the defendants; and they have denied that the defendants were entitled to receive a judgment for damages if there has been a valid rescission.

In considering the question of fraud and misrepre-

sentation the burden of proof is on the party or parties making the charge. The rule has been stated on numerous occasions. With particular reference to false representation as a basis for rescission it is stated in Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131, as follows: "To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby." See, also, Caruso v. Moy, 164 Neb. 68, 81 N. W. 2d 826; Wegner v. West, 169 Neb. 546, 100 N. W. 2d 542.

The substance of the allegations of fraudulent representations has already been set out. As to the first there is no evidence which within the meaning of the controlling principles proved the representations to be fraudulent. One of the occupations of Leonard A. Anson was that of a homebuilder. He did build the dwelling. There is evidence of a general character as to the construction of the building, but no representation that it was done according to standard practices and existing specifications required by law. The effective conclusion of the trial court that this specification was not sustained by sufficient evidence was not erroneous.

As to the second representation it may be said that the evidence discloses that the water supply came from a well located on the property. There is no evidence of representation either that it would provide a continuing supply or that it was constructed in accordance with standard practices or existing specifications required by law. It cannot be here said that the trial court erred in denying the defendants a recovery based on this specification.

As to the remaining specification, there were conver-

sations relating to the septic system. The gist of these conversations in this area, as testified to by the defendants, was that Leonard A. Anson said that he had never had trouble and he didn't see why the defendants should have trouble, and that he was sure that the tank was sufficient. It cannot be said that the trial court erred in its conclusion that this specification was not sufficiently proved.

In the light of this it must be said that rescission of the contract in question on account of the fraud alleged was properly denied.

There is another reason under undisputed facts and established principles of law for the denial of the relief sought by the defendants under their cross action. That reason is that there was no valid and recognizable rescission by the defendants.

Certain basic principles, as follows, must have received adherence in order that it may be said that a right of rescission has been established:

"The rescission of a contract must be in toto and the parties must be placed in status quo so far as the circumstances will permit.

"Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile.

"However a tender may not be regarded as valid or sufficient, even if it appears that it would have been futile, unless it is made to appear that at the time the tender was made there was a present and immediate ability to make the tender good." Bennett v. Emerald Service, Inc., 157 Neb. 176, 59 N. W. 2d 171. See, also, Caruso v. Moy, *supra;* Wegner v. West, *supra.*

Another principle is as follows: "Rescission by its nature implies the extinction of the contract which leaves the parties without a right of recovery on the contract itself." Wegner v. West, *supra.*

There was within the meaning of these principles no valid rescission made by the defendants. It is true that they declared a rescission, but there was no rescission of

the contract in toto, and no placement of the plaintiffs in status quo to the extent permitted by the circumstances.

The defendants never tendered or surrendered to the plaintiffs the property which was the subject matter of the contract in its condition at the time of the notice of rescission or thereafter, and never did offer to restore the property to the condition it was in at the time of the contract of sale and to return it. All that they ever did was to make a conditional offer of reconveyance stated in pertinent part as follows: "* * * and that the undersigned hereby offer to reconvey such property to you * * * upon the condition that you restore the moneys and things of value received as consideration for said purchase and sale, together with compensation for improvements made upon the property in reliance upon the contract."

For this reason also, that is, that within the meaning of law there was no valid rescission, the relief prayed by defendants was properly denied.

In view of the conclusion that the defendants have failed to sufficiently prove a right of recovery it does not become necessary to discuss the elements to be considered in arriving at what a recovery should be if a right had been established.

The plaintiffs adduced evidence sufficient, if not challenged and in the absence of a sufficiently established defense, to sustain the right to foreclose and for the amounts found by the court to be due. The defendants did not by pleading or evidence contest the amounts. The plaintiffs have not by cross-appeal raised any question in relation thereto. It is further true that the plaintiffs have accepted and do not complain of the character of the foreclosure decreed although it departs from the character prayed for in the petition.

In the light therefore of what has been disclosed by the record, the judgment of the district court should be, and it is, affirmed.

AFFIRMED.

MYRTLE ROACH, APPELLANT AND CROSS-APPELLEE, V. MELVIN ROACH, APPELLEE AND CROSS-APPELLANT.

117 N. W. 2d 549

Filed October 26, 1962. No. 35177.

1. **Divorce.** In fixing the amount of alimony and property settlement in a divorce action the court will take into consideration the estate of each party at the time of marriage, their respective contributions since marriage as well as the duration of the marriage, and the conduct of each party leading up to the divorce.
2. ———. The court may also consider the wife's loss of interest in her husband's property, and in her social standing, if any is shown, and to which party the decree was granted, their respective ages, earning ability, and condition of health, and all other pertinent facts and circumstances, and award alimony in such an amount as appears fair and equitable between the parties.
3. **Officers: Attorney and Client.** The purpose of section 23-1206, R. R. S. 1943, is to protect the public by making certain that the duties of county attorney are not influenced by private interest. Where a conflict of interest is not shown, the statute has no application.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed as modified.

Robert M. Harris and Martin, Davis, Mattoon & Matzke, for appellant.

W. H. Kirwin, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

Plaintiff, Myrtle Roach, by an amended petition, sought a divorce from the defendant, Melvin Roach. The trial court granted a divorce to the plaintiff and made a division of property and other allowances to the plaintiff. The plaintiff has appealed, asserting that the allowance of alimony and the division of property is wholly inadequate. The defendant has cross-appealed, asserting that the trial court erred in allowing an at-

torney's fee to plaintiff's counsel in view of section 23-1206, R. R. S. 1943.

The parties were married on June 3, 1933. Two children were born of the marriage, both of whom are of age and married. The evidence is sufficient to sustain the granting of a divorce and there is no issue raised on that question by this appeal. The parties moved to Kimball County in 1947 where they engaged in farming and ranching. They purchased a farm in Kimball County containing 640 acres, which is referred to in the record as section 15. The defendant also held a school land lease on the adjoining section 16 which appeared to be in default of the amount due thereon at the time this suit was tried. In 1948 they acquired a second farm of 640 acres in Kimball County which is referred to in the record as section 23. In 1958 the parties purchased a tract of land in Banner County containing 5.29 acres on which they operated a night club or dance hall, which is designated in the record as Lost Park.

On April 29, 1960, the parties sold section 15 to Arthur and Melva Heim for $25,600. Melva Heim is a daughter of Myrtle and Melvin Roach. The contract provided that the purchasers were to assume the $8,000 mortgage on the land and the balance of $17,600 was to be paid in annual installments of $1,000 commencing in 1968 and bearing interest at 2 percent per annum. The installments were to be divided equally between Myrtle and Melvin Roach when paid.

In April 1960, the parties sold a one-half interest in Lost Park to Eldon and Carol Garver for $5,000, Carol Garver being a daughter of Myrtle and Melvin Roach. The purchase price was to be paid in annual installments of $500, all of which were to be paid to Myrtle Roach.

Oil was discovered on section 23, which resulted in the drilling of 9 producing wells. The royalties at one time produced a much larger income than at the time of trial, but they had materially decreased because of oil depletion at the time the case was tried. The mar-

ket value of these royalties and the mineral interests reserved in sections 15 and 23 are not important here in view of their equal division between the parties by the trial court, which this court will not disturb.

During their farming operations the parties acquired much farm equipment consisting of tractors, trucks, plows, drills, combines, and other farm machinery. There is evidence that a part of this machinery was sold to Eldon Garver for the sum of $7,500. It is contended by Garver that this sale contract was terminated by mutual agreement. It is admitted that two tractors one of which is included in this sale agreement were sold for $6,315.92 and the proceeds applied in part to the payment of a joint note signed by Myrtle and Melvin Roach and other items of expense. The remainder of these proceeds amounting to $2,231 was held by agreement for the court's disposition.

By agreement of the parties the trial court appointed a receiver to collect and sell all farm equipment belonging to the parties. The receiver complied with the duties imposed on him and reported the net proceeds from this sale in the amount of $4,492.47.

There is evidence in the record that Myrtle and Melvin Roach sold certain farm machinery and equipment to Arthur Heim in 1957 for the sum of $7,150, payable $1,000 on or before December 31, 1957, and $1,000 each year thereafter until paid. There appears to be a dispute between Melvin Roach and Arthur Heim as to the amount remaining due, if any, on this contract, although it appears that at least $1,000 has been paid thereon.

There is evidence that Myrtle and Melvin Roach were the owners of approximately 80 head of cattle in early 1960. The evidence is that all cattle belonging to the parties were sold to a livestock company. On August 27, 1960, the actual amount still being held by the livestock company is $4,226.50. No other cattle were shown to exist which would be subject to consideration by the court in this action.

The parties agreed that plaintiff was to have the 1959 Oldsmobile automobile, a boat and motor, and a trailer house, owned by the parties subject to liens thereon, and defendant was to have other trucks and pickups owned by them. We will not disturb the contractual disposition of this personal property.

There is considerable evidence in this record concerning the sales of wheat raised on section 23 and under two Colorado leases. An interest in the wheat produced on the leased ground in Colorado is claimed by Eldon Garver. The actual ownership of this wheat cannot be determined from the record before us. The wheat raised on section 23 and its whereabouts or disposition is not made clear in the more than 1,800 pages of testimony we have before us. Some of it was in storage and subject to a government loan. Some was "penalty wheat" which required the deduction of penalty payments to the government. Some of it was damaged during farm storage and produced a very low price. The proceeds were used largely to pay expenses, taxes, and other indebtedness. Some of the proceeds appear to have been paid to Myrtle Roach, which money she contends was used in payment of their mutual obligations. The evidence shows that the wheat ground on section 23 had been placed in the soil bank program in 1959 for which an annual payment of $4,183.90 was being received from a government agency. Two such annual payments had been made at the time of trial on the 10-year soil bank program.

The record shows that there were 150 tons of hay on section 15 and 20 tons on section 23 belonging to the parties at the time of trial. There appears to have been a large number of farm tools and appliances left on section 15, some of which had been sold at public auction and accounted for by an auction company. The furniture on section 15 and some appliances from Lost Park were taken by Myrtle Roach and the remaining personal property at Lost Park was retained by Melvin Roach.

There are taxes and other obligations of the parties remaining unpaid.

There is evidence that Myrtle Roach inherited a tract of land in Texas. Its nature and value are not shown. The nature of the Lost Park operation is shown by the record, but the profit therefrom is speculative. The gross income from the Saturday night dances approximates $400 per dance, but the net income is not shown. There is much testimony in the record concerning the operations of the parties from 1958 to the time of trial. The keeping of books and records by the parties appears to have been of minor concern. The memories of the parties as to their business transactions are faulty. The sales of real estate and farm equipment to their sons-in-law, and the advancements of money in aiding them to get started in their farming operations, appear to have created confusion in valuing the joint assets of these parties.

At the time of this marriage the parties had few if any tangible assets. By their joint endeavors they accumulated the property they now have. The plaintiff, admittedly, worked in the fields and performed other physical labor when the occasion required. Their children are of age and married. Plaintiff is not able to sustain herself, although she has ability as a seamstress. The case appears to be one requiring an approximately equal division of the jointly-owned property. Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22; Eno v. Eno, 159 Neb. 1, 65 N. W. 2d 145.

The plaintiff complains of the inadequacy of the allowance made and particularly of the alleged failure of the court to consider her immediate needs. In considering these contentions, after a review of the evidence, we think that plaintiff is entitled to a division of property and an award of alimony as follows: The plaintiff is to have all right, title, and interest of the parties in section 15, including the contract of sale to Arthur and Melva Heim. Plaintiff shall also take any and all in-

terest, if any, in the school land lease on section 16, including any proceeds therefrom for improvements in case of the forfeiture or voluntary termination of such lease. Plaintiff is awarded all household goods belonging to the parties located on section 15 and all such in her possession at the time of trial. Plaintiff is awarded the 1959 Oldsmobile automobile, the boat and motor, and the house trailer. Plaintiff is awarded a one-half interest in all oil, gas, and mineral leases or royalties on all properties owned by the parties or either of them at the time of trial. Plaintiff is awarded one-half the proceeds from the sale of cattle to the Morrison Livestock Commission Co., which amount is retained by it pending the decision of this case. The Texas property inherited by plaintiff is awarded to plaintiff. In addition thereto plaintiff shall have a judgment for alimony in the amount of $25,000, payable $1,000 on the effective date of this decree and $200 on the first day of each month thereafter until such judgment is paid. Execution is awarded for the collection of any delinquent payments on this judgment.

The defendant is awarded all the remainder of the assets of the parties, subject to the obligations of the parties incurred prior to July 8, 1960, including the $235 attorney's fee owing to Holtorf & Hansen. Such assets are to include the remaining real estate and personal property including choses of action. The obligations to be assumed by defendant are not to include the personal expenses of the plaintiff incurred during the pendency of this suit, other than those specifically allowed.

This decree includes any amount claimed by plaintiff as temporary alimony or support money. The costs of this action are taxed to the defendant including an attorney's fee of $350 for the services of plaintiff's attorney in this court.

On cross-appeal the defendant contends that plaintiff's counsel is not entitled to the award of attorney's fees made to him in the district court in the amount of

$1,750, for the reason that it is barred by section 23-1206, R. R. S. 1943. This section of the statute prohibits a prosecuting attorney from participating in a civil action depending upon the same state of facts upon which any criminal prosecution, commenced or prosecuted, shall depend. Plaintiff's attorney was the deputy county attorney of Scotts Bluff County. In the trial of the divorce action, evidence was adduced in an attempt to show adultery on the part of defendant as a ground for divorce. The crime was not established, and the trial court so found. It is the contention of the defendant that under this statute a prosecuting attorney is prohibited from accepting attorney's fees in any civil case where an attempt is made to show facts which, if established, would constitute a crime under the laws of this state.

The evidence adduced related to an act of adultery in Banner County. There is no evidence pertaining to such an offense in Scotts Bluff County. There is no evidence that a criminal prosecution for adultery was commenced, prosecuted, or investigated in Scotts Bluff County. The defendant relies upon Ress v. Shepherd, 84 Neb. 268, 120 N. W. 1132, but a reading of that case will show that the factual situation was much different than in the case at bar. In Thompson v. Thompson, 151 Neb. 110, 36 N. W. 2d 648, this court held that the purpose of section 23-1206, R. R. S. 1943, is to protect the public by making certain that the duties of county attorneys are not influenced by private interest. We fail to see how any conflict of interest could arise when the crime sought to be established occurred in a county other than where the civil suit was filed. We think the trial court properly overruled the objection of the defendant to the participation of plaintiff's counsel and the allowance of attorney's fees for his services.

The decree of the district court awarding a divorce to the plaintiff is affirmed. The award of alimony and division of property decreed by the district court is

modified in accordance with this opinion, and as so modified it is affirmed.

AFFIRMED AS MODIFIED.

WARREN H. GROSS. APPELLANT, V. DENNIS S. JOHNSON ET AL., APPELLEES.
117 N. W. 2d 534

Filed October 26, 1962. No. 35182.

1. **Automobiles: Highways.** A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it.
2. **Highways.** A user of highways may assume that other users thereof will use them in a lawful manner and govern his acts in accordance with such assumption unless or until he has warning, notice, or knowledge to the contrary.
3. **Automobiles: Highways.** A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.
4. ———: ———. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view.
5. **Highways.** The word "highway," insofar as the rules above stated are concerned, applies to streets as well as highways.
6. ———. An arterial highway is not deprived of its character or status because a stop sign on an intersecting road is temporarily displaced or otherwise rendered invisible.
7. **Negligence: Trial.** Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury.
8. **Trial.** It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses.
9. **Damages.** When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Reversed and remanded.

Kennedy, Holland, DeLacy & Svoboda, Joseph P. Cashen, and Clarence E. Heaney, Jr., for appellant.

Haney & Walsh, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

Warren H. Gross, plaintiff, brought this action in the district court for Douglas County against Dennis S. Johnson and Marvin Johnson, defendants, to recover damages for injuries sustained by the plaintiff as a result of a collision between an automobile driven by the plaintiff and an automobile driven by Dennis S. Johnson, defendant. Marvin Johnson, defendant, died during the pendency of the action and by order of the court the action was revived in the name of Eileen A. Johnson as administratrix of the estate of Marvin Johnson, deceased. The case was tried to a jury resulting in a verdict for the plaintiff in the amount of $1,998.62. The plaintiff filed a motion for new trial. The defendants, Dennis S. Johnson and Eileen A. Johnson, filed a motion for judgment notwithstanding the verdict. The plaintiff's motion for new trial and the defendants' motion for judgment notwithstanding the verdict were overruled. The plaintiff perfected appeal to this court.

The first question to determine is whether or not the evidence adduced at the trial was such that the question of the defendants' negligence or of the plaintiff's contributory negligence should have been submitted to the jury.

There is no dispute by the parties that a collision occurred on November 25, 1958, at approximately 7:50 a.m., at the intersection of Thirty-third and Hickory Streets in Omaha, between a 1958 Volkswagen automobile operated by Dennis S. Johnson and a 1956 Plymouth

automobile operated by the plaintiff; that Thirty-third Street is protected by stop signs; and that vehicles approaching the intersection on Hickory Street from the west are required to stop before entering the intersection.

The plaintiff, in his petition and the amendment thereto, alleged in the amendment that the Volkswagen driven by Dennis S. Johnson was a family-purpose automobile. The petition further alleged that the accident and plaintiff's injuries were caused solely and proximately by the recklessness and negligence of the defendant Dennis S. Johnson in the following particulars: In failing to keep a proper lookout for northbound traffic on Thirty-third Street and particularly the automobile operated by the plaintiff; in failing to keep defendants' vehicle under proper control; in failing to yield the right-of-way to the plaintiff's vehicle; in traveling at a high and excessive rate of speed; in failing to stop for a stop sign governing eastbound traffic on Hickory Street entering the intersection at Thirty-third and Hickory Streets; in failing to make timely application of the brakes on the Volkswagen that would enable the driver to avoid a collision with another automobile assuming that the driver thereof was exercising due care; and in failing to swerve or divert the course of the automobile so as to avoid a collision with the plaintiff's automobile assuming that the driver thereof was exercising due care. The plaintiff further alleged that as a direct and proximate result of the negligence of Dennis S. Johnson the resulting collision caused the plaintiff to sustain severe, painful, and permanent injuries, expenses for doctor bills, hospital bills, ambulance service, loss of wages, and damage to his automobile for which he prayed damages.

The defendants, in their amended answer, denied every allegation contained in the plaintiff's petition except the allegations of the petition admitted in such answer to be true. The defendants, in their amended answer, denied that the accident occurred as a result of

any conscious negligence on the part of the defendants. The defendants further alleged that said accident, in addition to any acts committed by the defendant Dennis S. Johnson, was due to the negligence of the plaintiff in the method and manner in which the plaintiff operated his automobile at the time and place of the collision; and that the negligence of the plaintiff was more than slight and directly contributed to the happening of the collision. The defendants prayed that the plaintiff's petition be dismissed.

The plaintiff's reply to the defendants' amended answer denied every allegation contained therein except as admitted to be true by the plaintiff's petition.

For convenience we will refer to Dennis S. Johnson as defendant. Eileen A. Johnson was the co-owner with Marvin Johnson, now deceased, of the Volkswagen driven by Dennis S. Johnson, and no further mention need be made of the defendant Eileen A. Johnson. Warren H. Gross will be referred to as plaintiff, his automobile as the Plymouth, and the automobile driven by Dennis S. Johnson as the Volkswagen.

The record shows that Thirty-third Street is 24 feet wide and Hickory Street is 24 feet wide. There are stop signs on either side of Hickory Street to protect drivers on Thirty-third Street proceeding north or south. The speed limit on both streets is 25 miles an hour. Both streets are level and straight. Thirty-third Street runs north and south, and Hickory Street runs east and west and is straight as it proceeds west from the intersection. There is a slight jog of 34 inches as Hickory Street goes in from the west which is of little consequence in this case. Hickory Street is paved with asphalt and Thirty-third Street is paved with brick. On the day of the accident the weather was cloudy and it was misting. The surface of both streets was wet. Along the west side of Thirty-third Street running south is a hedge which also runs west from the southwest corner of Hickory

Street. The height of this hedge from the level of the street is 54 inches.

A police officer connected with the traffic division investigated the accident which occurred in the intersection of Thirty-third and Hickory Streets, and made a report of the accident within an hour from the time of its occurrence. When he arrived at the scene of the accident he found the Volkswagen driven by the defendant and the Plymouth driven by the plaintiff. He testified that the Plymouth was located approximately 10 to 15 feet north of the curb of Hickory Street on Thirty-third Street, facing in a northeasterly direction. This witness ascertained the approximate point of impact of the Plymouth and the Volkswagen by debris and skid marks in the street. The skid marks were laid down by the Volkswagen and were 5 feet 6 inches in length. The debris was 7 feet 6 inches from the north curb of Hickory Street and 12 feet from the east curb of Thirty-third Street, which would be approximately at the centerline of the intersection. The skid marks extended from the west up to that point. This witness further testified that he had a conversation with the defendant. The defendant said that he applied his brakes but due to the wet street he was unable to stop. This witness also had a conversation with the plaintiff in the hospital. The plaintiff said his speed was 15 to 20 miles an hour, and that he was going north on Thirty-third Street and did not see the Volkswagen until the collision occurred. On cross-examination this witness testified that there are stop signs on the northeast and southwest corners of the intersection of Thirty-third and Hickory Streets; and that he saw no evidence that the plaintiff had applied his brakes. On redirect examination this witness testified that the defendant stated that he was eastbound on Hickory Street when he approached Thirty-third Street and slowed down but did not see anything coming until he was within 10 or 12 feet of the plaintiff's Plymouth.

The plaintiff testified that he was employed by the Missouri Pacific Railroad Company as a reclaim clerk. He was familiar with the intersection of Thirty-third and Hickory Streets, and had traveled through it regularly since August 1958. On the morning of the accident, he started to work at 7:30 a.m. He proceeded north on Thirty-eighth Street to Martha Street, then proceeded east to Thirty-third Street and then north on Thirty-third Street. He testified that there is a hedge located just inside of the sidewalk line on the southwest corner of the intersection; that the sidewalk sits back approximately 3 feet from the west curb of Thirty-third Street, and the sidewalk is 3 or 4 feet wide; that the distance between the curb line and the sidewalk is 3 or 4 feet; and that the hedge was free of foliage at the time of the accident. This witness further testified that there are trees located in the parkway between the sidewalk and the curb west of Thirty-third Street on the south side of Hickory Street. On the morning of the accident, as he neared the intersection of Thirty-third and Hickory Streets, he was traveling between 15 and 20 miles an hour. He looked first to his right (east) and then to his left (west) at the time he was 30 to 35 feet back from the intersection. He testified that when he looked to the left, or west, he could see about 90 feet, and he saw nothing coming from the west. He proceeded into the intersection at a speed of 15 to 20 miles an hour, and as he was leaving the intersection and the front of his Plymouth was close to the north curb line, he looked to the west and saw the Volkswagen coming down upon him, it being about a car length to his left, or west. The Plymouth was hit immediately on the left side at the doorpost between the front and rear doors, causing the Plymouth to swerve to the east over the curb, and its right wheel to hit a telephone pole. The Plymouth then whipped around to the northeast and came to a stop 6 to 8 feet north of the north curb line of Hickory Street, facing northeast. Exhibits received in evidence

disclose that the Volkswagen came to rest on Hickory Street just east of Thirty-third Street, facing in a southerly direction.

A witness who was driving south on Thirty-third Street at the time of the accident testified that just before he entered the intersection he saw a Volkswagen approaching Thirty-third Street from the west on Hickory Street. The Volkswagen's left wheels were right at the centerline of Hickory Street. He observed a car parked at the south curb about 20 feet to the west of the stop sign. When he first saw the Volkswagen it was about 30 feet from the entrance to the intersection. The Plymouth was just ready to enter the intersection from the south on Thirty-third Street. He estimated the speed of the Plymouth to be not in excess of 20 miles an hour. When he first saw the Volkswagen, this witness' car was 12 feet or more from the north curb of Hickory Street. This witness further testified that he had the Volkswagen in his vision from the point about 30 feet prior to entering the intersection until it actually made contact with the Plymouth; that the Volkswagen did not come to a stop prior to entering the intersection; that at the time of the impact the Plymouth was in the east line of traffic just over the centerline of Hickory Street; and that it seemed to him that the front of the Volkswagen struck near the center or a little to the rear of the left side of the Plymouth. This witness estimated the speed of the Volkswagen as being in excess of 40 miles an hour, and testified that the defendant, prior to the time of the impact, did not diminish his speed. On cross-examination this witness testified that the impact occurred predominantly in the southeast quarter of the intersection; and that he did make a statement that the stop sign was very difficult to see unless you knew where it was.

The defendant testified that at the time of the accident he was under 21 years of age and was on his way to work; that he was proceeding east on Hickory Street

at a speed of 20 to 25 miles an hour; that he was driving on his own side of the street; that when he was about 60, 65, or 70 feet to the west of the intersection he observed to his left that there was no traffic coming from that direction; that he then looked to the right, or south, and observed that there was a hedge; that as he approached the intersection there was a car parked south and west of the curb line on Hickory Street; that he had to turn out for this car because it was parked against the curb; that if there was an imaginary centerline on Hickory Street, he was approximately 6 inches south of that line; and that he proceeded on, still looking to the right, or south, but was unable to see anything coming from the south on Thirty-third Street because the hedge was blocking his view. This witness further testified that when he was just even with the hedge line, close to the intersection of Thirty-third and Hickory Streets, he saw the stop sign, the Plymouth, and "everything all at one time." His speed at that time was 18 to 20 miles an hour. He further testified that the front end of the Plymouth was about even with a tree on the east side of Thirty-third Street south of the intersection; that when he saw the Plymouth he slammed on the brakes; and that his speed at the time of the impact was 8 to 10 miles an hour. This witness further testified that the Plymouth did not slow down from the moment he saw it until the time of the impact; that he saw the driver of the Plymouth as it was proceeding northward to the point of impact, and the driver was looking to the north and never turned his head to the left (west) or right (east) before the impact; and that the Plymouth was traveling 6 or 8 inches east of the middle line of Thirty-third Street. This witness was able to get the Volkswagen turned to the left, but very little. This witness further testified that the front end of the Volkswagen contacted the Plymouth between the two doors on the left side of the Plymouth; that the front bumper of the Plymouth, with respect to the centerline of Hickory

Street, at the moment of impact was 2 or 3 feet north of the centerline; that the estimated speed of the Plymouth was 30 to 35 miles an hour; and that on the day of the accident the stop sign faced due west, but now it is tilted, which helps visibility, but not too much. The defendant further testified that he had never been on Hickory Street at Thirty-third Street before the morning of the accident.

The record established that the Volkswagen driven by the defendant was a family-purpose automobile.

This court has held as follows: "A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it. * * * A user of highways may assume that other users thereof will use them in a lawful manner and govern his acts in accordance with such assumption unless or until he has warning, notice, or knowledge to the contrary. * * * A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection. * * * The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view." Nichols v. McArdle, 170 Neb. 382, 102 N. W. 2d 848.

The word "highway," insofar as the rules above stated are concerned, applies to streets as well as highways.

In Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352, 74 A. L. R. 2d 223, this court said: "An arterial highway is not deprived of its character or status because a stop sign on an intersecting road is temporarily displaced or otherwise rendered invisible." Cases are cited establishing the rule.

The defendants rely on the recent case of Hammon v. Brazda, 173 Neb. 1, 112 N. W. 2d 272, wherein this

court held: "A motorist proceeding in the exercise of ordinary care cannot be held negligent in failing to stop at an intersection with an arterial highway with which he is not familiar, where the stop sign protecting the arterial has been broken off and he could not be expected to be aware of its presence." The opinion went on to say that this case differs from Bell v. Crook, *supra,* for the reason that therein the driver on the nonfavored road knew that a stop sign ordinarily protected the arterial highway and that the sign was down, and we held: " 'If a motorist knows of the through character of a highway, the presence or absence of warning signs is immaterial as respects his negligence in failing to yield the right-of-way.'

"There are some cases in other jurisdictions which hold the nonfavored driver guilty of negligence as a matter of law regardless of lack of knowledge. Titus v. Braidfoot, 226 Ala. 21, 145 So. 423, and Jones v. McCullough, 148 Kan. 561, 83 P. 2d 699, are two of them.

"We believe, however, the better rule is the one represented by cases such as Schmit v. Jansen, 247 Wis. 648, 20 N. W. 2d 542, 162 A. L. R. 925; Chambers v. Donaldson, 122 Cal. App. 2d 452, 264 P. 2d 950; Mason v. Yellow Cab & Baggage Co., 153 Tex. 344, 269 S. W. 2d 329; and Lyle v. Fiorito, 187 Wash. 537, 60 P. 2d 709.

"Without attempting to analyze the conflicting views, we hold that a motorist proceeding in the exercise of ordinary care cannot be held negligent in failing to stop at an intersection with an arterial highway with which he is not familiar, where the stop sign protecting the arterial has been broken off and he could not be expected to be aware of its presence."

The evidence discloses that the defendant was driving east on Hickory Street toward the intersection of Thirty-third Street at a speed of 20 to 25 miles an hour, which was the lawful rate of speed on Hickory Street and in that area. As the defendant approached to a distance of 60 or 70 feet west of the intersection, he looked

to his left for approaching automobiles. He then looked to his right, or south, and saw a hedge located on the southwest corner of the intersection which tended to obstruct his vision to the south on Thirty-third Street. Then he saw a car parked on the south side of Hickory Street just east of the sidewalk located approximately 55 feet west of the intersection. The defendant had never been on Hickory Street proceeding toward Thirty-third Street and this intersection prior to the accident. The evidence also shows that there was a tree that tended to obstruct or interfere with his vision to the south, and this tree was located about 7 feet west of the stop sign. The defendant was unaware that there was a stop sign located at the southwest corner of the intersection. There is evidence to the effect that the defendant turned the Volkswagen to go around the parked car and then commenced to reduce his speed; that as he passed the parked car he was still proceeding on the south side of Hickory Street with the left side of the Volkswagen approximately 6 inches south of an imaginary center-line of Hickory Street. As the defendant neared the hedge located on the southwest corner of the intersection, he saw the stop sign and the plaintiff's Plymouth approaching the intersection from the south, and attempted to turn the Volkswagen to the left. The Volkswagen skidded on the wet pavement a distance of 5 feet 6 inches. There is evidence from which the jury could find that the plaintiff was driving his Plymouth north on Thirty-third Street at a rate of speed of 30 to 35 miles an hour, which was beyond the lawful speed limit of 25 miles an hour in that area; that the plaintiff did not reduce his speed or attempt to turn the Plymouth, or apply his brakes as he approached the intersection; and that the plaintiff could not see the Volkswagen until the collision occurred. There is also evidence that the defendant was traveling 40 miles an hour and did not diminish his speed; and that the stop sign was difficult to see unless you knew it was located on that corner.

Considering the evidence in its entirety, the questions of negligence on the part of the defendant and contributory negligence on the part of the plaintiff were for the jury to determine.

"Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. * * * It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses." Klein v. Wilson, 167 Neb. 779, 94 N. W. 2d 672.

This brings us to the question presented by the plaintiff that the verdict is totally inadequate. This assignment of error goes to the injuries sustained by the plaintiff as the result of the collision.

A plastic surgeon testified that the plaintiff received multiple contusions and lacerations to the face and hand, including a transverse laceration of the right cheek that extended posteriorily through the ear and on to the scalp adjacent to the ear; and that the total length of this laceration was about 13 centimeters, or a little less than 6 inches. This laceration was approximately half an inch deep and involved the right parotid gland and seventh cranial nerve. The doctor further testified that as a result of this laceration there was a weakness of the muscles of the eyelid and inability to move the muscles of the forehead on the right side. The doctor sewed the laceration together on the morning of the accident and put a special dressing over the face so that the plaintiff's mouth could only open about half an inch. The plaintiff was seen a few times by the doctor up until March 28, 1959. The doctor gave as his opinion that the plaintiff, at the time of trial, had reached about maximum improvement.

A neurologist testified that he found a decreased sensation throughout the major portion of the right side of the plaintiff's face due to an involvement of the fifth cranial nerve, which he described as producing a sensation similar to that of one having received a novocain injection. This doctor further testified that he found damage to the seventh cranial nerve, resulting in loss of motor power in the plaintiff's right forehead, and damage to the fifth and seventh cranial nerves which would or could be permanent in nature.

There is some evidence that about three months subsequent to the accident the plaintiff suffered headaches, some of them for a short period of time and others of a severe nature for a longer period of time. There is testimony by a physician called by the defendants to the effect that these headaches could not have been attributed directly to the accident, but could be the result of tension on the part of the plaintiff due to his concern over the scar on his face. This doctor concluded that the plaintiff had residuals of injury to the nerve supplying the muscles of the upper part of the face, resulting in a moderate right upper facial weakness, and he felt that the plaintiff might have had some involvement of the sensory nerves, that is, the feeling nerves, to the right side of the head and face. He felt that the sensory nerve changes would not be entirely due to nerve injury. He concluded that the motor nerve involvement and weakness probably would not improve; that any part of the sensory change which is truly organic probably would not improve; and that a rather large part of the sensory change was functional and could be cleared up in time.

The plaintiff's contention is that the verdict of the jury was the exact amount of special damages, minus a bill of Dr. Ladwig for $80. The plaintiff sets forth that the undisputed evidence established that the special damages were as follows: Drs. Dunn and Hubbard, $20; Dr. Black, $285; Douglas County Hospital, $3.50; Omaha Ambulance Service, $10; Bishop Clarkson Me-

morial Hospital, $171.25; 1956 Plymouth Automobile, $1,225; Dresher Cleaners, $5.70; and loss of wages, $278.17. The total as set forth by the plaintiff was $1,998.62.

The plaintiff's Plymouth was demolished to such a degree that the salvage price was estimated at about $185, while the retail value was appraised at $1,410, making the loss $1,225.

With reference to Dr. Black's bill, $25 was a charge for a report made to the plaintiff's attorneys which should not have been included in the bill. Therefore, Dr. Black's bill would be $260.

With these deductions, the total of the special damages should be $1,973.62, making a difference of $25.

The plaintiff testified that he remained in the hospital for a period of 5 days; that it was a month after the accident before all the bandages were taken off of his face; that he first returned to work on December 15, 1958, that is, he was not at work from November 25, 1958, until December 15, 1958; and that it was 6 months before he was able to do the work which he had done prior to the time of the accident.

In instruction No. 20 given by the trial court, the jury was told to consider: "1. The character and extent of the injuries, if any, and whether the evidence shows with reasonable certainty that any are permanent and will continue to exist in the future to the fullest extent, or only partially, or whether his injuries were only temporary ones from which he will recover; 2. Such pain and suffering of body and mind as you may find, from a preponderance of the evidence, that the plaintiff has sustained by reason of this accident; 3. Such pain and suffering of body and mind as you may find, from a preponderance of the evidence, the plaintiff is reasonably certain to suffer in the future by reason of injuries sustained in this accident; * * *." Other parts of the instruction dealt with medical bills, loss of wages, ambulance charges, etc.

This court held in Dolen v. Beatrice Restaurant Co.,

137 Neb. 247, 289 N. W. 336: "When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict."

In Schumacher v. Lang, 160 Neb. 43, 68 N. W. 2d 892, this court said: "We have now definitely established the rule that: 'When the amount of the damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.' Ambrozi v. Fry, 158 Neb. 18, 62 N. W. 2d 259. * * * As this record stands, it would have been an abuse of discretion for the trial court to have refused to set aside the verdict and grant a new trial." Cases are cited in this opinion with somewhat similar factual situations where the court came to a like conclusion.

We deem the aforesaid authorities controlling in this case.

The plaintiff predicates error on the giving of certain instructions which need not be considered here except to say that in instruction No. 8 given by the trial court, the trial court told the jury in a part of this instruction: "It is the duty of a driver of a motor vehicle to keep a constant lookout in the direction of anticipated danger." The word "constant" means remaining unchanged, and steady. See Webster's Third New International Dictionary. This instruction would indicate to the jury that the plaintiff should have looked continuously to the left, or south. It could be true that the plaintiff could have anticipated danger from the right, or from either or both directions. The word "constant" as used in the instruction is not proper and should not have been used in the connection in which it was used.

In the light of the evidence and the authorities heretofore cited, we conclude that the judgment of the trial court should be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

R. T. CALDWELL, APPELLEE, V. JAMES R. WELLS, APPELLANT.
117 N. W. 2d 486

Filed October 26, 1962. No. 35240.

1. **Bills and Notes.** In an action on a promissory note lack of consideration is an affirmative defense.
2. ———. In an action on a promissory note the lack of delivery of the note is an affirmative defense.
3. **Courts: Trial.** It is not the prerogative of a trial court to make an independent investigation of the issues between the parties when there is no provision of law providing for such an investigation.
4. ———: ———. Such an investigation is improper procedure and prejudicial.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Reversed and remanded.

Young, Denenberg & Mullery, for appellant.

Leslie D. Carter, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is an action at law brought in the municipal court of Omaha by R. T. Caldwell as plaintiff, against James R. Wells, defendant, on a promissory note to recover the amount of $1,177.03, and costs. The defendant prevailed in the municipal court. The case was appealed to the district court for Douglas County by the plaintiff. The plaintiff's petition in the district court alleged that on September 28, 1959, the defendant did execute and deliver to the plaintiff a promissory note in the sum of $1,177.03. Defendant in his answer, among other affirmative defenses, alleged that the defendant received no consideration for the signing of the note, and pleaded lack of consideration as a defense; and that the note was never delivered by the defendant to the plaintiff or any other person acting in the plaintiff's behalf.

A jury was selected, duly impaneled, and sworn, and the trial was continued to December 20, 1961. Hearing

was had at the trial court's request. The defendant stated his theory of his defense. The trial court ruled that the defendant's statement of his theory of the defense did not constitute a legal defense to the plaintiff's claim. The defendant made an offer of certain exhibits and statements for the record. The plaintiff made a motion for judgment, and offered the instrument sued upon. The plaintiff's motion was sustained and the trial court rendered judgment in favor of the plaintiff in the sum of $1,177.03, with interest and costs as prayed for in the plaintiff's petition.

The defendant filed a motion for new trial. The defendant also filed a motion to have the motion for new trial set for hearing before the presiding judge of the district court for Douglas County for the reason that the trial court had disqualified itself from further acting in the case and from deciding the motion for new trial because the trial court considered the results of a private ex parte investigation unknown to the defendant, and for the reason that the defendant was not given an opportunity to present evidence to rebut the ex parte investigation made by the trial court.

The transcript shows: "THE COURT: Following the first pre-trial conference the Court made inquiry of the Secretary of State at Lincoln as to the status of James, Inc., and received the following communication: 'James, Inc., dissolved on Dec. 9, 1957, for failure to pay occupation tax.' "

The defendant's motion for new trial was overruled. The defendant perfected appeal to this court.

The principal assignments of error are as follows: The trial court erred in holding that the defense of failure of consideration was not a valid defense to the instrument upon which the plaintiff sued; the trial court erred in not allowing evidence on the issue of lack of delivery which is a valid defense to the note upon which the plaintiff sued; and the trial court erred in conducting an independent investigation as to matters concern-

ing the issues between the parties and should have either disqualified himself or referred the defendant's motion for a new trial to another trial judge.

On December 20, 1961, proceedings were held in chambers before the trial judge wherein the trial court made a finding that there was no controversial issue of fact, rendered judgment for the plaintiff, and discharged the jury.

We first point out that it is not the prerogative of a trial court to make an independent investigation concerning issues between the parties when there is no provision of law providing for such an investigation. In the instant case the trial court was following improper procedure which was prejudicial.

In Leach v. Treber, 164 Neb. 419, 82 N. W. 2d 544, this court said: "In an action on a promissory note, the party alleging want of consideration has the burden of proving it by a preponderance of the evidence." See, also, Plaza Hotel Co. v. Hotel Stratton, 132 Neb. 396, 272 N. W. 224.

In Elmcreek Ditch Co. v. St. John, 127 Neb. 253, 255 N. W. 16, this court said: "The right to make the statutory defense of 'failure of consideration' in an action on a negotiable promissory note implies the right to prove that defense by competent evidence." There are other cases holding as the above-cited cases.

The lack of delivery of a promissory note is an affirmative defense. See, §§ 62-115 and 62-116, R. R. S. 1943; Monroe v. Parker, 122 Neb. 499, 240 N. W. 548; Luikart v. Braasch, 130 Neb. 361, 265 N. W. 13.

Other assignments of error need not be determined.

We conclude that in the light of the affirmative defenses set up in the defendant's answer and the proceedings held by the trial court the defendant is entitled to a new trial.

We reverse the judgment of the trial court and remand the cause for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. BENJAMIN K. CROWLEY, APPELLANT.
117 N. W. 2d 488

Filed October 26, 1962. No. 35246.

1. **Trial.** The findings of the court in an action where a jury is waived have the same weight as a verdict of a jury.
2. **Indictments and Informations.** A mere misnomer of the offense is not fatal to the validity of the complaint or information.
3. ———. An information must inform the accused with reasonable certainty of the charge against him that he may prepare his defense and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense.
4. ———. Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute.

Appeal from the district court for Sarpy County: JOHN M. DIERKS, Judge. Affirmed.

L. W. "Jim" Weber and Philip H. Robinson, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SIMMONS, C. J.

This is an appeal from a judgment of the district court in a case where a jury was waived. The defendant was charged with the operation of a motor vehicle after sunset at a speed in violation of section 39-723, R. R. S. 1943. He was found guilty and appeals. We affirm the judgment of the trial court.

The statute provides: "No person shall operate a motor vehicle on any highway outside of a city or village * * * at a rate of speed exceeding * * * fifty-five miles per hour between the hours of sunset and sunrise, * * *."

We state the facts in the light of the established rule that the findings of the court in an action where a jury

is waived have the same weight as a verdict of a jury. See National Bank of Commerce v. Bossemeyer, 101 Neb. 96, 162 N. W. 503, L. R. A. 1917E 374.

It was stipulated that at the time involved, defendant was driving at a speed of 65 miles per hour. It was further stipulated that at the time and place involved, it was "approximately 15 minutes after scientifically computed and astronomically determined sunset time." There was a trial controversy over whether or not the defendant was driving with the use of headlights. Defendant contended that he was not using his lights. The State's witnesses testified that users of the highway were operating automobiles with headlights on. The trial court's judgment resolves that fact in favor of the State.

We find no contention that in fact the time involved was not after sunset. The defendant testified that the weather was clear, very few clouds, it was dry, and "I could see the horizon."

The defendant's next contention arises as the result of two facts. The one was that there was a sign posted along the highway that recited: "Speed Limit Day 65 Night 55 Radar control." The other is that the complaint had a caption: "For Speeding At Night." The charge was that the defendant operated his motor vehicle at a rate of speed exceeding 55 miles per hour "between the hours of sunset and sunrise."

Defendant then argues at length that night and sunset are not concurrent. That night follows sunset with a dusk period in between and that it was not yet night when he was arrested.

We need spend no time in discussing the highway sign. We find no evidence that the defendant ever saw it, knew about it, or relied upon it.

It is also perfectly patent that defendant was charged, in the language of the statute, for driving at a prohibited rate of speed after sunset. The charging part of the complaint controls. The rule is: "A mere misnomer

of an offense sought to be charged is not fatal to the validity of a criminal complaint or information." State v. Feist, —— N. D. ——, 93 N. W. 2d 646. See, also, 42 C. J. S., Indictments and Informations, § 111, p. 991; In re Application of Harrison, 55 Ariz. 347, 101 P. 2d 457; State v. Elkins, 216 Ore. 509, 339 P. 2d 715.

Defendant's contention is not sustained.

The next contention is that the complaint is not sufficient in that it does not specifically state the time or the place of the alleged offense.

He relies upon May v. State, 153 Neb. 369, 44 N. W. 2d 636, and other cases of like import. We there held: "An information must inform the accused with reasonable certainty of the charge against him that he may prepare his defense and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense. Article I, section 11, Constitution of Nebraska; Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717. It must state expressly and directly each fact that is an essential element of the crime intended to be charged so that the accused will not be required to go beyond the information to learn the nature of the charge against him or the issue he must meet, and it cannot be aided by intendment, by anything stated therein by way of mere recital, or by inference or implication."

The complaint here is not deficient so as to bring it within the above holding.

The rule is: "Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute." Goff v. State, 89 Neb. 287, 131 N. W. 213.

We reaffirm that holding. The complaint states the date of the offense as on or about June 9, 1961; it charges an unlawful operation of a motor vehicle on a highway outside of a city or village at a rate of speed exceeding 55 miles per hour between the hours of sunset and sunrise, contrary to the statute; and it charges that offense occurred in Sarpy County, Nebraska.

The charging part of the complaint fully meets the test of the rule relied on by the defendant.

The judgment of the trial court is affirmed.

AFFIRMED.

WILLIAM A. SNOWARDT, APPELLANT, V. CITY OF KIMBALL, KIMBALL COUNTY, NEBRASKA, APPELLEE.
117 N. W. 2d 543

Filed October 26, 1962. No. 35290.

1. **Trial.** Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence.
2. **Workmen's Compensation.** In order to recover, the burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
3. ———. Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributable to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause.
4. ———. Where the first accident is not the proximate cause of the second accident, the second accident constitutes an independent intervening cause.
5. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law.
6. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.

Appeal from the district court for Kimball County: JOHN H. KUNS, Judge. Affirmed.

Heaton & Heaton, for appellant.

Halcomb, O'Brien & Everson and Harry R. Meister, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a workmen's compensation case. The plaintiff sought medical expenses and compensation for an injury allegedly sustained on September 6, 1959, while employed as a policeman by the city of Kimball. The one-man compensation court found that plaintiff sustained a temporary disability as the result of the accident on that date but that his present disability is the result of a subsequent accident which had no connection with his employment. Plaintiff elected to appeal directly to the district court for Kimball county.

After a trial in the district court, specific findings were made that the plaintiff had suffered a back injury in other employment August 20, 1956; that he had sustained a temporary disability involving no compensable loss of time in an accident on September 6, 1959; and that subsequently, on October 27, 1959, he suffered another accident outside of his employment. The court further found that the plaintiff had failed to maintain the burden of proving that the accident of September 6, 1959, was the proximate cause of his present disability, and allowed him a recovery only for the medical expenses incurred between the time of the accident on September 6 and September 25. From this judgment plaintiff appeals to this court. The cause is here for trial de novo on the record. Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51.

William A. Snowardt, hereinafter referred to as the plaintiff, on September 6, 1959, was 40 years of age, was 6 feet 2 inches tall, and his normal weight was 245 pounds. He was employed as a night policeman for the city of Kimball at a salary of $315 per month. About 1 a.m. on that day, while patrolling with another officer, he came upon two drunks who were fighting near a tavern and dance hall located within the city limits of Kim-

ball. One of the men, weighing about 160 pounds, had his arm around the neck and throat of the other man and was choking him. Plaintiff, in attempting to break the hold, lifted the man off the ground about 6 inches, at least twice. He testified that on this occasion he experienced a sharp stabbing pain in his back and released his hold. He then struck the man with the side of his hand on the jaw, broke the hold, and made an arrest. He continued to work the rest of the night. The next morning at 8 o'clock, when he picked up the chief of police, he told the chief of the incident.

Plaintiff testified that he was in severe pain when he went home that morning and that his wife used a heat lamp on his back to relieve the pain. The testimony of the wife is to the effect that, as she remembers, she used the heat lamp for 3 successive days. She also testified plaintiff could not bend down and she had to help him put on his socks and pull up his trousers. Plaintiff further testified that he experienced continuous pain thereafter but did not consult a doctor for a week or 10 days. The medical evidence is that a doctor was not consulted for 17 days, or until September 23, 1959, at which time plaintiff made an office call on Doctor Siedenburg of Kimball. On that same day he also consulted a chiropractor at Pine Bluffs, Wyoming. He made office calls on Doctor Siedenburg again on the 24th and 25th of September. The doctor gave him medication and physical therapy, and advised him to wear a wide belt.

On the 27th of October 1959, plaintiff was helping a neighbor put an extension on a TV antenna on the top of a trailer house. When he lifted the extension it became tangled in some electrical wires and the plaintiff was knocked unconscious. When he regained consciousness, he was lying flat on his back on the top of the trailer house. He did not know with what force he was knocked down. This electrical shock burned holes in both of his heels about the size of the tip of his little finger. A doctor was called, but by the time he arrived

plaintiff had recovered consciousness and there was very little treatment given. Plaintiff did not see this doctor thereafter. On October 29, he consulted Doctor Siedenburg who treated the burns and sores on his feet. He consulted Doctor Siedenburg again on the 4th, 5th, 6th, and 7th of November, and so far as the record indicates, the treatment given was confined to the feet. Doctor Siedenburg testified as follows concerning this period: "Q Doctor, from the first visit to your office in the latter part of October, until he was hospitalized in November, did he at any time ever complain to you about back pains or problems to his back? A From what date? Q From the time he came in to see you the latter part of October, until he was admitted to the hospital? A Yes. He started complaining of his back while I was treating him for his feet. Q Do you recall specifically what those complaints were? A Well, when I first put this ointment on the soles of his feet, it worked real well, but then, the next day it didn't work as well, and the next day after that, not quite as well; because he was beginning to try to walk without putting his weight on his heels, and as he did that, he developed more and more backache. Q What do you mean by walking without putting the weight on his heels? A Well, you walk on the ball of your foot and try to take the weight on the front part of your foot rather than your heel. Q Is that what Mr. Snowardt was doing? A That is my understanding. He was trying to take the weight off the soles of his feet by putting more of it on the balls of the foot. Q In other words, he was balancing himself in an unnatural position, physically? A That's right. Q Now, did he do that continually until he was admitted to the hospital—the walking in this unnatural position? A Yes, he did. Q What was he admitted to the hospital for? A For back pain—severe back pain, radiating down in the right leg."

Plaintiff was admitted to the Kimball County Hospital on November 8, 1959, and placed in traction. He

was released from the hospital on November 22. On November 23 his difficulty returned, and he was referred to a neurosurgeon and admitted to the DePaul Hospital at Cheyenne, Wyoming, where he had surgery. Doctor Grizzle, the neurosurgeon who performed the surgery, testified plaintiff had sustained an injury to his intervertebral disc which allowed it to protrude. Plaintiff was released from DePaul Hospital on December 4, 1959, and returned to work about April 1, 1960.

In 1956, while doing construction work for another employer, plaintiff hurt his back. He was taken to a medical clinic. The doctor told him he thought that vertebrae were injured, and injected some medicine around the area of the injury and gave him some pills. He later went to a chiropractor, who X-rayed his back and told him two vertebrae had slipped out and were pinching a nerve. The chiropractor gave him four or five treatments thereafter. On this occaison, plaintiff missed 2 days of work, and thereafter on this job did only light work. He quit after 10 days and went back to a previous employer, Solomon Mills at Buda, Nebraska, working 7 days a week.

Doctor Calkins, a Kimball physician, testified the plaintiff consulted him on November 13, 1958, for back pain. The doctor's record has a notation under that date, "Low Flank & back pain." The doctor testified he treated the plaintiff on that occasion, but the plaintiff denied ever consulting him. Doctor Calkins was treating other members of the family, including Mrs. Snowardt who was pregnant. Her record was kept on a separate card, and this record designates "Mr." rather than "Mrs." and lists the plaintiff's correct age. This testimony is not material on the question of injury, because there could be recovery if plaintiff proved the activation or aggravation of a preexisting injury. Maul v. Iowa-Nebraska Light & Power Co., 137 Neb. 128, 288 N. W. 532. It is material, however, on the question of plaintiff's

credibility and that of his wife. They both testified that the plaintiff had fully recovered from whatever difficulty he experienced in 1956, and that he had no back difficulty whatever until the accident of September 6, 1959. In this respect, it is also to be noted that Doctor Masek, a chiropractor and therapist consulted by plaintiff after the October 27th accident, testified that plaintiff's history indicated he had had some back trouble periodically just about a year and a half prior to November 5, 1959.

Doctor Grizzle testified that from the history he received he presumed that the injury of September 6, 1959, weakened plaintiff's disc. In this regard, as will be set out later, Doctor Grizzle received no history of any previous back difficulty. With reference to the accident of October 27, Doctor Grizzle's testimony is as follows: "A It may be that his fall aggravated his back condition. However, and since we can only go by his statement, at the time, he indicated that it did not aggravate his back. Q In other words, in your opinion, it is a condition that he had prior to the fall, from what you know of the history? A From what I know of the history, yes, this protruded disc could have started before his fall. * * *."

Doctor Grizzle further testified: "Q Didn't the patient's history indicate that afterwards, the pain caused by the scuffle had pretty well cleared up? A Yes. Q Hadn't his condition improved considerably, Doctor? A No. I don't have the original—does somebody have the original? They took my original history. MR. HEATON: Hasn't that been sent back to you? I thought I mailed it to you—I am sorry. Q Doctor, let me ask this question? A Yes. Q Assuming that Mr. Snowardt's own story to you was that after the injury, if there was an injury from the scuffle—A Yes. Q —his condition improved considerably, and it wasn't until after the fall on the trailer roof that he again experienced considerable pain, would that change your opinion, assuming that, Doctor? A Assuming what you have just said would

be true, it would only be my opinion to the effect the second injury caused his disc protrusion to come out again. Q Well, would it be possible under that assumption, that the second fall actually was the cause? A Not with the history that he gave me of the original injury. Q Even though the pain had disappeared? A Yes, even though the pain had disappeared, because—that is what we got into such a long discussion about. This is as if you had a rock and you are moving it toward the edge of this desk—you move it two feet—it starts at three feet, and you move it two feet, and then a week later you come along and move it another foot and it falls off the edge of the desk; which act actually caused the rock to fall off the desk? You see my point? Q But, can you say from the history that you have of this patient, that this scuffle referred to was actually the first movement of the rock? A That is what I assume, from what the patient told me. Q But from what he told you, there were several other things that could have been the first instance, were there not? I mean, from this history, can you say positively that the scuffle caused the protrusion, in the first instance? A Well, we are at a philosophical point, aren't we, here? We have to accept what the patient says as true when he came to me the first time seeking treatment. Q You are aware of the patient's history of back trouble prior even to the scuffle, are you not? A *No; because he didn't discuss too much of that with me.* Q You didn't discuss his physical condition or his back condition at all, prior to the scuffle? A We do in the course of our interrogation of the patient, but usually at that time, if the patient has had trouble before, he usually admits it. Q Well, in this particular case, was there no discussion of any prior difficulty with the back? A No. I don't have any note of it on here. * * * Q With a protrusion, Doctor, would you say it was usual for the back to pain for a while and then stop? I mean, does the condition better and worsen over a period of time? A Yes, it is

characteristic—I think if we got a—really, a case history of every patient that has a disc, sooner or later we find that over a period of time they will have periods of ups and downs with this thing, if they have been untreated by surgery. Lots of times they start from one injury, and then maybe a year or so later they will have another problem. And this, I think we touched upon on our previous deposition too, and we said that for our purpose, all we could do is take the injury that put the man out of commission. Q And then you assume that this is the original cause? A We assume that is, yes. Q *But that assumption would be definitely affected if there was history of prior injury to the back, or prior treatment to the back for pain?* A *I think if there is a definite history to the back, yes, that it would.* Q And where you have two injuries fairly close together in time—A Yes. Q *—you definitely are not saying that you can tell which caused the protrusion originally, are you? In other words, it could be caused by either injury, when they are close together in time?* A *Yes.* Q Even though the first injury was associated with the back? A Right. And again, we go on the history to ascribe which injury was responsible." (Italics supplied.)

The plaintiff worked every night without interruption from September 6 to September 23, 1959, but he did not work the night of September 23 which was the day he consulted Doctor Siedenburg and the chiropractor. He worked continuously after September 23 until November 8, when Doctor Siedenburg put him in the hospital. The only testimony as to the plaintiff's continuous difficulty from September 6 to November 8, 1959, was that of plaintiff and his wife. Plaintiff's testimony was that he had severe pain in his lower back at all times after September 6. He testified: "It was almost impossible for me to bend over to put on my shoes and tie them and put on my overalls or trousers. I would have to either throw them at my feet or have my wife start them on."

The history plaintiff gave to the neurosurgeon was to

the effect that the electrical shock caused him to fall to his buttocks on the top of the trailer house. The doctor's testimony from the history further indicates that the plaintiff told him he was not aware of any increase in his lower back discomfort after this fall until approximately 1 week to 10 days later when his right leg began to pain him severely. It is evident that plaintiff minimized the accident of October 27, 1959, when he consulted Doctor Grizzle. It is undisputed, however, that he did not experience the pains shooting down into his right leg until at least a week after October 27. It does seem that if plaintiff could do no bending or lifting as his wife testified, or if his back troubled him between September 6 and October 27 as much as his testimony would indicate, that it would have been difficult and unusual for him to climb to the top of a trailer house to install an extension on a TV antenna. It does test credulity to believe that plaintiff could have been knocked unconscious, flat on his back, and not have suffered an increase in his back discomfort if it was as constant as he testified it was. Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence. Dworak v. City of Omaha, 172 Neb. 209, 109 N. W. 2d 160.

For plaintiff to obtain a recovery herein he must adduce competent evidence having probative value which predominately convinces the trier of fact that he sustained an accident on September 6, 1959, which resulted in the disability for which he is now seeking compensation. As we said in McDuffee v. Seiler Surgical Co., Inc., 172 Neb. 325, 109 N. W. 2d 384: "The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment."

Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributable to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. Where the first accident is not a proximate cause of the second accident, the second accident constitutes an independent intervening cause. See Towner v. Western Contracting Corp., 164 Neb. 235, 82 N. W. 2d 253. Plaintiff makes no contention that the first accident had anything to do with the second one. His contention is that his disability on November 8, 1959, had no connection with the accident of October 27.

The plaintiff argues that the Workmen's Compensation Act is to be liberally construed so that its beneficient purposes may not be thwarted by technical refinement of interpretation. This is the rule followed in this jurisdiction. However, the liberal construction referred to applies to the law and not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that the claimant shall prove his right to compensation by a preponderance of the evidence and it does not permit a court to award compensation when the requisite proof is lacking. Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405.

Both the judge of the compensation court and the district court found the accident of October 27, 1959, to be the cause of plaintiff's hospitalization and surgery. It is not necessary to discuss the sufficiency of the evidence on that point. It is sufficient in a determination of this appeal to state that, as we view the record, the plaintiff has not sustained the burden of proving that the accident sustained by him on September 6, 1959, was the proximate cause of the disability for which he was treated subsequent to October 27, 1959.

We have said many times that an award of compen-

sation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. Towner v. Western Contracting Corp., 164 Neb. 235, 82 N. W. 2d 253.

For the reasons given above, the judgment of the district court was in all respects correct and is affirmed.

AFFIRMED.

PEARL C. HOPWOOD, APPELLANT, V. GEORGE VOSS ET AL., APPELLEES.
117 N. W. 2d 778

Filed November 9, 1962. No. 35188.

1. **Appeal and Error.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
2. **Trial.** Where the court instructs a jury correctly on a subject involved on the trial of a case, and a party desires more explicit instruction with regard thereto, it is his duty to offer a more specific instruction.
3. **Negligence: Damages.** Where it is pleaded and proved that two or more parties, even though recovery is sought against only one, were guilty of combined negligence which taken together proximately caused injuries to the plaintiff, the entire damage may be assessed by a jury against the one made a party.
4. **Trial.** The charge of the trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Kenneth H. Dryden, Smith Brothers, and Soren S. Jensen, for appellant.

John E. Dougherty, for appellee Voss.

Tye, Worlock & Knapp, for appellees Aetna Cas. & Surety Co. et al.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action for damages for personal injuries by Pearl C. Hopwood, plaintiff and appellant, against George Voss, defendant and appellee. Aetna Casualty and Surety Company, a corporation, and the City of Kearney, a municipal corporation, were made parties on account of their rights of subrogation in the event of recovery in damages by the plaintiff for payments made by them pursuant to the Workmen's Compensation Act. Further mention of these parties will not be required. Hopwood will be referred to hereinafter as plaintiff and Voss as defendant.

The case was tried to a jury and a verdict was rendered in favor of the defendant and against the plaintiff. Judgment was rendered on the verdict. Thereafter a motion for new trial was filed. This motion was overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

This case was before this court previously as Hopwood v. Voss, 172 Neb. 204, 109 N. W. 2d 170, but it is pointed out that the matters decided there are not of any controlling significance as to the matters presented by this appeal.

The action arose out of a head-on collision between an automobile and a tractor operated on Twenty-sixth Street, a street of the city of Kearney, Nebraska, at about 8:30 p.m. on June 24, 1958. On that date one Gene Harvey was driving a tractor eastward on the north side of Twenty-sixth Street at a speed of not to exceed 5 miles an hour. Attached to the rear of the tractor was a trailer on which was carried a device for spreading a chemical fog the purpose of which was to destroy certain insects. The device was in operation and was being operated by the plaintiff. When the tractor and the accompanying device reached a point about halfway between Avenue E and Avenue G the defendant came from the east in a Ford automobile at a speed of 25 to 30 miles an hour and came into collision with the front

end of the tractor. As a result of this collision the plaintiff was injured.

By his petition the plaintiff alleged that the defendant was guilty of negligence which was the proximate cause of the collision and of his injuries. The defendant denied these allegations and alleged affirmatively that the accident and injuries were proximately caused by the heedless, reckless, and negligent acts of the operator of the tractor.

He pleaded further that the plaintiff was guilty of contributory negligence, but this court, in the earlier case referred to herein, concluded that such a defense was not on the evidence available to the defendant.

There are five assignments of error which the plaintiff has asserted as grounds for reversal. One of them generally is that the verdict is contrary to law. It requires no separate consideration. On the basis of the other four, the question of whether or not the verdict is supported sufficiently by evidence, and the further question of whether or not there is reversible error in instructions given and a failure to instruct properly and sufficiently, are presented.

By the second assignment of error it is urged that the verdict of the jury is contrary to and against the overwhelming weight of evidence. It is observable that the complaint is not that the verdict had no evidence to support it but that it was contrary to evidentiary weight.

With regard to the right of this court to weigh evidence in an action at law for damages, this court said in Nisi v. Checker Cab Co., 171 Neb. 49, 105 N. W. 2d 523: "It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence." See, also, Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701; Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144; Johnston v. Robertson, 171 Neb. 324, 106 N. W. 2d 192; Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12.

As to the question of negligence the plaintiff as incidents thereof alleged that the defendant failed to maintain a proper lookout for vehicles or equipment belonging to the city; that the defendant operated his car at an excessive rate of speed, said speed being in excess of 25 miles an hour; that the defendant negligently failed to maintain the control of his said vehicle necessary to prevent the same from running into, upon, and against the vehicle in which this plaintiff was traveling; and generally that the defendant failed to operate his vehicle so as to prevent it from running into, upon, and against the vehicle on which the plaintiff was riding. He did not charge negligence or contributory negligence against anyone else.

The defendant filed an answer in the case in which he charged that the plaintiff's injuries were proximately caused by the negligence of the driver of the tractor which was pulling the trailer on which the plaintiff was riding. The specifications were that this driver failed to keep and maintain a proper lookout; that he failed to have the machine under control; that he failed to drive his machine upon the right half of the highway; that he failed to seasonably turn his machine from the left-hand side to the right-hand side so as to permit the defendant to have the legal right-of-way; that he failed to give any signal or warning of his intention to usurp the use of the left-hand side of the highway; that if he had looked he could have observed that he had time to turn to the right and avoid a collision, but this he failed to do; and generally that he failed to yield the right-of-way.

By the answer negligence and contributory negligence of the plaintiff were pleaded but this court in its former opinion, which is cited herein, concluded that this defense was not available to the defendant. The reply was a general denial. The driver of the tractor will be hereinafter referred to as Harvey.

A review of the pertinent evidence in support of the

pleaded cause of action of the plaintiff discloses that there was evidence that on the evening in question the plaintiff and Harvey, on behalf of the city of Kearney, were engaged in the distribution of a chemical composition to produce a spray or fog which, after moving under power about 5 feet, floated about 20 feet with the wind and thereafter it raised and was carried in the direction of the wind about a block; that at the time the wind was from the southeast; that the purpose was to destroy insects in the air and in foliage; that at the time in question it was at least dusk, if not dark; that the operation was from west to east on the north or left-hand side of Twenty-sixth Street; that Twenty-sixth Street is not paved but it has a graveled surface estimated to be of the width of 30 to 35 feet; that Harvey was operating the tractor behind which a trailer was attached; that the plaintiff was riding on the trailer and was operating the fogging device but had no control over the operation of the tractor; that at the time of the collision the tractor and trailer were off the traveled portion of the street and on a part which has been referred to as a borrow pit; that there is some evidence that the right side may have been outside and to the south of the borrow pit a short distance; that the way was clear and unobstructed to the east and one could possibly see for a distance of 2 blocks without lights; that the defendant's car, which had lights, could be seen at a distance of 4 or 5 blocks; that at the time there was no fog to the south and the fog being created was moving to the northwest; that the movement of the tractor eastward was not over 5 miles an hour; that the tractor had observable headlights which could be seen from the east; that at the time of the collision neither the plaintiff nor Harvey was looking to the east; and that the tractor and defendant's automobile collided head-on and after the collision stood from 1 to 1½ feet apart.

Against this is evidence that the defendant came from the east on his right side of the street and on the traveled

portion at 25 to 30 miles an hour and when he was about a block from the point of collision he observed what appeared to be smoke which obscured his vision on account of which he could not and did not see the tractor or its lights; that he drove into this smoke and the front end of his automobile collided with the front end of the tractor; and that at the time the tractor and trailer were entirely in the traveled portion of the street and not in the borrow pit.

The manifest and single purpose of the plaintiff was, by his pleading, to state a cause of action against a single defendant and to prove the pleaded cause of action against that one defendant. He offered no evidence manifesting directly or inferentially a contention that Harvey was in anywise responsible.

The purpose of the defendant was to plead negatively a denial of plaintiff's claim, and affirmatively that plaintiff's injuries were caused by negligence of Harvey.

Examination of the evidence discloses that there was competent evidence of probative value to support the cause of action of plaintiff. This was counteracted by evidence also of probative value. The contention of the defendant that negligence of Harvey caused the accident found support in the evidence. There was, as to this, evidence of probative value to the contrary.

The issues tried and presented for review here were of disputed fact and for determination by the jury. It follows therefore that on the basis of the principle set out herein the second assignment of error may not be sustained.

The next assignment of error is that the court erred in failing to instruct regarding the duty of the driver of a motor vehicle when his vision is obscured by fog or smoke. The following instruction in this area was given by the court: "You are instructed that the presence of fog or smoke on a highway is not an independent intervening cause as that term is mentioned in the definition of 'proximate cause,' but is, rather, a condition of

the highway which it is the duty of the driver of a motor vehicle to take into consideration in operating his motor vehicle." As a statement of principle this has been approved. See, Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825; Jones v. Union P. R. R. Co., 141 Neb. 112, 2 N. W. 2d 624; Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250. The plaintiff requested no further or more explicit instruction with regard to this subject. Under the circumstances disclosed it must be said that if the plaintiff desired more specific instruction it was the duty of his counsel to offer a more specific instruction. See Graves v. Bednar, *supra*. The assignment of error may not be sustained.

The remaining two assignments of error deal with a single subject matter and will be considered together. The charge in them is that the court erred in giving instructions Nos. 4 and 8, for the reason that they did not properly and sufficiently submit the theory of proximate cause, or more particularly the controlling principles relating to more than one cause which proximately contributed to an accident.

By instruction No. 4 the jury was told that the burden was on the plaintiff to prove that the defendant was guilty of one or more of the acts of negligence alleged by plaintiff, and that such negligence was "the proximate cause" of plaintiff's injuries.

By instruction No. 8 the jury was told that if any damages of plaintiff were not "caused proximately" by negligence of the defendant in this case the plaintiff would not be entitled to recover. The claimed error as pointed out in the brief is that the issue to be determined by the jury was that of whether or not the defendant Voss was guilty of any negligence which constituted or was part of the proximate cause resulting in the accident and injuries to the plaintiff, but that these two instructions did not inform the jury that if the plaintiff had proved that the negligence of the defendant constituted any part of the proximate cause,

combined with any negligence on the part of the driver of the tractor, in such an event, the jury should find for the plaintiff. In other words, it is contended that by these instructions the jury was told only that it could find for the plaintiff if it found that the proximate cause was the conduct of the defendant, but did not tell it that it could also so find if the defendant was guilty of a negligence which only proximately contributed to the accident.

As an abstract and academic statement, and citations are not necessary to support it, where in a case it is pleaded and it is proved that two or more parties, even though recovery is sought against only one, were guilty of combined negligence which taken together proximately caused injuries to a plaintiff, the entire damage may be assessed by a jury against the one made a party.

The record in this case does not disclose that the two instructions, in the light of instruction No. 6 which was given, run in contravention of this statement. They are in this light in strict conformity with it. The petition charges that the negligence of the defendant Voss was "the proximate cause."

The case was tried and all evidence was adduced at the conclusion of which no amendment to the petition was made or offered. Also there was no manifest effort made to present the case on a theory of causation of the accident by the defendant and Harvey.

It follows therefore that by these instructions the case was submitted in strict conformity with the pleaded cause of action and the evidentiary theory of the plaintiff. This was in conformity with established rules. In Springer v. Henthorn, 169 Neb. 578, 100 N. W. 2d 521, it was said: "The charge of the trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence." See, also, Becks v. Schuster, 154 Neb. 360, 48 N. W. 2d 67; Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677; Owen, Admr. v. Moore, 166 Neb. 226, 88 N. W. 2d 759.

The plaintiff may not therefore properly complain that these two instructions did not present the issues presented by his pleaded cause of action and his apparent theory of proof.

If it should be assumed that in view of the fact that the defendant asserted by his answer that the accident and injuries were caused by the negligence of Harvey the plaintiff was entitled to the benefit of the combined evidence rule and instruction in pursuance thereto, still it may not be said that there was improper or insufficient instruction.

To present this theory the plaintiff tendered an instruction in pertinent part as follows: "Therefore, if you find that the negligence of the defendant, George Voss, was a proximate cause of the accident, or a proximately contributing cause of the accident, although Harvey may have been to some degree negligent, the defendant Voss is responsible for the whole result and the degree of blame as between himself and Harvey is immaterial."

The instruction was refused. Instead, on this subject the court on its own motion gave instruction No. 6 which contained the following: "If the plaintiff * * * has satisfied you by the preponderance of the evidence that the defendant * * * was negligent in any of the respects charged against him * * * and * * * If you further find from all of the evidence in the case that Gene Harvey * * * was also negligent in any of the respects charged * * * and * * * That the proximate cause of the accident was the combined and concurrent negligence of the two * * * Then your verdict must be for the plaintiff * * * and this result would follow even though the negligence of the defendant * * * or of Gene Harvey * * * was more or less than that of the other."

This instruction contained in complete and clear essence the same direction as the one which was requested and refused by the court. It clearly extended and defined the meaning of the term "proximate cause" so

that it included concurring causes as requested by the plaintiff in his proposed instruction.

If it be assumed that the plaintiff was entitled to instruction which departed from and enlarged the meaning of the term "proximate cause" as used in the petition of the plaintiff, it must be said that the departure was accomplished fully and fairly by instructions Nos. 4, 6, and 8. To have instructed on concurring negligence in the light of the pleaded cause of action in any other substance would have been erroneous. These assignments of error are therefore without merit.

For the reasons herein set forth the judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

PRISCILLA C. ROGERS, APPELLEE, V. VERL E. PETSCH, ALSO KNOWN AS BUS PETSCH, APPELLANT, IMPLEADED WITH LESTER M. BECK ET AL., APPELLEES.
117 N. W. 2d 771

Filed November 9, 1962. No. 35193.

1. **Waters.** The owner of land upon which springs are located and from which waters flow in a well-defined channel in the course of drainage through other lands does not have an exclusive right to control and use the waters to the injury of lower riparian owners or senior appropriators.
2. ———. Waters flowing from springs which do not form a watercourse or lake are surface waters until they empty into and become part of a natural stream or lake.
3. ———. The owner of land upon which surface waters arise may retain them for his own use and change their course upon his own land by a ditch or embankment.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Atkins, Ferguson & Nichols, for appellant.

Lovell & Raymond, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This action was brought by Priscilla C. Rogers as plaintiff against Verl E. Petsch as defendant to enjoin interference with the natural flow of water from Nealy Springs and to require the defendant to remove certain structures on his land. By answer and cross-petition the defendant alleged that the flow of water from Nealy Springs did not exceed the volume necessary for his use for domestic purposes, and prayed that the plaintiff be enjoined from trespassing upon his property and interfering with his use of the water and that he recover damages.

The trial court found that the defendant was entitled to the use of the water from Nealy Springs for household purposes, the watering of his garden and lawn around the house, and the watering of all of his livestock; and that the maintenance of two dams or ponds and a lateral running east on the defendant's property was an unlawful interference with the flow of water from Nealy Springs. The trial court enjoined the use of the lateral and ordered the removal of the dams or ponds. The defendant's motion for new trial was overruled and he has appealed.

This being an action for equitable relief, we are required to try the issues of fact complained of de novo and reach an independent conclusion without reference to the findings of the district court. § 25-1925, R. R. S. 1943; Toelle v. Preuss, 172 Neb. 239, 109 N. W. 2d 293.

The property involved in this action is all located within Section 11, Township 23 North, Range 58 West of the 6th P. M., in Scotts Bluff County, Nebraska. The defendant is the owner of that part of the east half of the southwest quarter of Section 11 which lies north of the right-of-way of the Chicago, Burlington & Quincy

Railroad Company, except that part owned by the State of Nebraska and the right-of-way in favor of the State of Nebraska for highway purposes. The plaintiff is the owner of that part of Section 11 which lies between the north or left bank of the North Platte River and the south line of the right-of-way of the Tri-State (Farmers Irrigation District) Canal.

The north boundary of the plaintiff's land is the south line of the Tri-State Canal right-of-way. The railroad right-of-way is directly north of the canal right-of-way. Before 1956 the south boundary of the defendant's property was the north line of the railroad right-of-way. At that time U. S. Highway No. 26 ran parallel to and directly north of the railroad. In 1956 the defendant conveyed a strip of land across his property to the State of Nebraska for highway purposes. Part of the land conveyed had been previously occupied as the highway. As now constructed, U. S. Highway No. 26 curves to the north so that the south line of the highway right-of-way at the west line of the defendant's property is approximately 500 feet north of the north line of the railroad right-of-way. The effect of the 1956 conveyance by the defendant to the state was to sever a triangular tract lying between the railroad right-of-way and the highway right-of-way from the remainder of his property which is north of the highway right-of-way.

The defendant obtained title to his property in 1950 by conveyance from Leonard LaVerne Nealy and Mabel Nealy. The northern part of the defendant's property consists of level terrace farmland. The terrace is a rough bench of Brule clay which is a tight, impervious formation that does not hold or transfer water in large quantities. The Brule clay is covered by a layer of sand and gravel and then a layer of soil. Near the south end of the defendant's property the terrace is eroded. The soil there contains sand and gravel and is of a more porous nature. Nealy Springs flows out of a gully at an elevation 25 or 30 feet below that of the

level terrace farmland. The source of the water flowing from Nealy Springs is return flow from irrigation and natural precipitation.

A concrete dam constructed across the gully impounds water flowing from the springs until it rises sufficiently to flow through a trough near the top of the dam. The trough is a section of round steel pipe 1.69 feet in diameter that has been split lengthwise. There was evidence that the water flowing through the trough was .21 feet deep at the deepest part and the volume of water flowing through the trough was from .059 to .092 cubic feet of water per second. Water flowing through the trough then flows into a pond described as the north pond.

The north pond is approximately one-fifth of an acre in area and from 5 to 8 feet deep. Water can be released from the north pond to the east through a spillway into a lateral which is from 700 to 800 feet long. The first 350 to 400 feet of the lateral is lined with concrete. Water flowing through the lateral eventually flows into a basin near the southeast corner of the defendant's property.

There is a second pond upon the defendant's property described as the south pond. The south pond is approximately one-fourth of an acre in area and is located south and west of the north pond. There was evidence that the volume of water flowing from the north pond to the south pond was 120 gallons per minute.

The plaintiff's rights are based upon two permits for the appropriation of water from Nealy Springs for the purpose of irrigation granted by the Department of Water Resources of the State of Nebraska and its predecessor, the Department of Roads and Irrigation. They are referred to as application No. 2311 and application No. 9777.

In 1933 the plaintiff's land was owned by Paul H. Covington. In that year Covington obtained a permit to appropriate .06 cubic feet of water per second from

Nealy Springs to irrigate a 4-acre tract consisting of his yard and garden. Covington constructed a concrete dam upon the defendant's property just south of the north pond. He then installed a wooden pipeline running from the dam south of the north pond on the defendant's property to the plaintiff's property. Before the pipeline was constructed, water from the springs ran down under the old highway through a culvert and into the Farmers Irrigation Canal during the winter and before the irrigation season. After the pipeline was installed the water ran through the pipe onto the plaintiff's land. During the irrigation season Nealy took all of the water and Covington received only excess or runoff water.

Covington did not use the water from Nealy Springs for irrigation after 1936 and installed two irrigation wells on the plaintiff's land. Covington filed the acreage reports required by section 46-261, R. R. S. 1943, from 1934 through 1956, but there is no evidence that he used any of the water for irrigation purposes after 1936. On August 6, 1956, Covington executed and delivered to the defendant a written assignment of his interest in a license to construct and maintain the pipeline across the railroad right-of-way together with the pipe and works on said right-of-way. O. E. Bible was one of the witnesses to this assignment.

The concrete dam constructed by Covington on the defendant's property just south of the north pond has a hole knocked in it where the wooden pipe was formerly placed. The pipe south of the south pond has collapsed from heavy equipment being operated over the surface of the ground where the pipe is buried.

In 1948 Covington sold the plaintiff's land to the defendant on contract. In 1950 the contract of sale was surrendered by mutual agreement and Covington went back into possession.

In 1956 O. E. Bible purchased the plaintiff's land from Covington and went into possession during the first

part of August. Bible did not use any of the water from Nealy Springs for irrigation and did not file any acreage reports. While he owned the property he installed a third irrigation well. In 1957 Bible sold the property to Lester M. Beck and Hattie M. Beck.

In 1959 the Becks sold the property to the plaintiff on contract. The Becks were made parties to the action but they have no interest in the property other than as contract vendors. In 1959 the Becks filed an application for a permit to appropriate 1 cubic foot of water per second from Nealy Springs to irrigate the entire tract of land owned by the plaintiff. This application, known as No. 9777, was approved by the Department of Water Resources on July 20, 1960.

Exhibit 1-A, a map filed by the Becks as a part of application No. 9777 and referred to in the order approving the application, shows that the applicants proposed to construct a diversion structure upon the triangular tract of land owned by the defendant that lies between the highway right-of-way and the railroad right-of-way. The record shows that the diversion structure or settling basin actually built by the plaintiff is partly upon the defendant's land and partly upon the highway right-of-way. The pipeline leading from the settling basin crosses the defendant's land until it reaches the railroad right-of-way.

The plaintiff's rights in this action depend entirely upon the validity of the permits to appropriate water from Nealy Springs for irrigation purposes granted under application No. 2311 and application No. 9777. There is no authority in our law for the appropriation of water flowing from springs located upon the lands of another where the water does not create or become a stream or watercourse. The right to appropriate water for irrigation purposes under our law is limited to waters of natural steams. Art. XV, §§ 5 and 6, Constitution of Nebraska; §§ 46-202, 46-204, and 46-259, R.

R. S. 1943; Drainage Dist. No. 1 v. Suburban Irrigation Dist., 139 Neb. 460, 298 N. W. 131.

Where the waters flowing from springs flow naturally in a well-defined channel in the course of drainage through other lands, the owner of the land upon which the springs are located does not have an exclusive right to control and use the waters to the injury of lower riparian owners or senior appropriators. Slattery v. Dout, 121 Neb. 418, 237 N. W. 301. But where the waters flowing from springs do not form a watercourse or lake they are surface waters until they empty into and become part of a natural stream or lake. Lackaff v. Bogue, 158 Neb. 174, 62 N. W. 2d 889. See, also, Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387; Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154. The owner of land upon which surface waters arise may retain them for his own use and change their course upon his own land by ditch or embankment. Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195.

There is no evidence that the waters from Nealy Springs have ever flowed in a definite or well-defined channel. The only evidence as to how the water did or would flow in a state of nature is that it would flow normally toward the valley and river and that before Covington constructed the pipeline it went down through a culvert under the old highway and into the Farmers Irrigation Canal. Surface waters do not lose their character as such by reason of their flowing from the land on which they first make their appearance onto lower land in obedience to the law of gravity or by flowing into a natural basin from which they normally disappear through evaporation or percolation. Lackaff v. Bogue, *supra*.

There is considerable evidence which suggests that the water from Nealy Springs would never reach plaintiff's land in a state of nature. The small volume of water flowing from the springs, the gravelly nature of

the soil on the defendant's land south and east of the springs, the concrete dams and lateral constructed by the defendant, the location of the diversion structures erected by Covington and the plaintiff, and the pipelines constructed by Covington and the plaintiff all support an inference that the plaintiff's land would receive very little if any water flowing from Nealy Springs in a state of nature.

We think the evidence in this case, when considered as a whole, establishes that the waters flowing on the defendant's land from Nealy Springs are surface waters and as such are not subject to appropriation by the plaintiff. That being true, the injunctions granted by the trial court should not have been granted. We think the evidence further establishes that the plaintiff had no right to construct the settling basin and pipeline upon a part of the defendant's property.

We have considered the evidence of the defendant in support of his claim for damages and find that he is not entitled to recover any amount from the plaintiff for the expense of hauling feed and cattle to Torrington, Wyoming.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment in conformity to this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ROBERT WILLIAM LOSIEAU, APPELLANT.
117 N. W. 2d 775

Filed November 9, 1962. No. 35231.

1. **Criminal Law. By the terms of section 29-2221, R. R. S. 1943, where punishment of an accused as an habitual criminal is sought, the facts with reference to the charge of habitual criminal must be set out in the indictment or information which**

charges the criminal offense, but the facts thus set out shall not be an issue on the trial of the criminal offense, that is, during the trial the fact that the defendant is charged as being an habitual criminal shall not be disclosed to the jury.

2. **Criminal Law: Venue.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed.
3. **Criminal Law.** In a criminal case where it is sought to have a verdict of guilty set aside on the ground that the defendant did not have a fair trial on account of prejudice, the trial court has a large discretion in ruling on the question of prejudice.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

William G. Line, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is a criminal action wherein in the district court for Dodge County, Nebraska, Robert William Losieau, defendant, appellant here, was, in an information filed by the county attorney in the name of the State of Nebraska as plaintiff, appellee here, charged with the offense of breaking and entering, and further that he was an habitual criminal. The defendant was tried to a jury and convicted of the offense charged. On a later hearing in the action to the court he was found to be an habitual criminal and was sentenced to serve a term of 20 years in the State Penitentiary at Lincoln, Nebraska.

The defendant filed a motion for new trial which was overruled. From the order overruling this motion and from the judgment sentencing him the defendant has appealed.

As grounds for reversal of the judgment the defendant's brief contains eight assignments of error. Only

one of these requires separate consideration. The other seven deal with a single subject matter and therefore do not require separate consideration.

The one requiring separate consideration is the seventh. By this one it is contended that the verdict is not sustained by sufficient evidence. It must be regarded as having no merit. The brief of the defendant in the following words substantially so declares: "On the record in this case if the defendant's witnesses were telling the truth, defendant could not possibly be guilty. If the accomplices were telling the truth defendant could not possibly be innocent. It was the task of the jury to weigh the evidence and decide where the truth lay."

By the other seven assignments of error it is urged that the defendant was tried in an atmosphere wherein the danger of the jury being improperly influenced in its determination of guilt or innocence prevented it from being said that the defendant was accorded a fair trial. Specifications urged are that in consequence of this the court erred in failing to grant a change of venue; it erred in failing to quash the jury panel; it erred in failing to grant a mistrial; it erred in failing to dismiss the action; and it erred in failing to grant a new trial.

There is no showing made the effect of which was to say, or from which a reasonable inference could be drawn, that the jury was improperly influenced, but only that it could have been. The defendant does not contend otherwise.

One theory of the presentation of the defendant is that if a jury or its members had knowledge or came into possession of knowledge during or before a trial that a defendant on trial for a criminal offense and as an habitual criminal, the knowledge or possibility of acquisition of knowledge that he was charged with being an habitual criminal would render a verdict of guilty invalid, no matter whether that information was disclosed by the proceedings on the trial or from some other source or, as applied to this case, through publica-

tions contained in newspapers. The defendant relies for support upon the following from section 29-2221, R. R. S. 1943: "Where punishment of an accused as an habitual criminal is sought, the facts with reference thereto must be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted, but the fact that the accused is charged with being an habitual criminal shall not be an issue upon the trial of the felony charge and shall not in any manner be disclosed to the jury."

The reliance of the defendant is in particular on the words "and shall not in any manner be disclosed to the jury."

The consideration here is, by the record, limited to the question of whether or not there was a possibility that during the trial the jury obtained information from newspapers that the defendant was charged as an habitual criminal, and not to such information obtained theretofore or through the processes of the trial.

The record negatives prior information and information obtained through trial processes. After 24 prospective jurors were called they were separately examined and each by answer disclaimed possession of any information the effect of which would be to say that he or she knew that the defendant was charged as an habitual criminal. It will be said here that each denied knowledge of anything which would prevent himself or herself from becoming a fair juror. From this group the jury was selected. There is nothing in the record to show and it is not suggested in the brief of the defendant that any such information was disclosed at the trial.

Coming back then to the true meaning of the words "and shall not in any manner be disclosed to the jury" it can be said that they have reference only to what shall or rather what shall not be disclosed at the trial. The clear and unmistakable meaning is that the charge of being an habitual criminal shall be contained as an

issue in the information but that issue may not be disclosed to the jury at the trial. The language is incapable of any other meaning. The jury does not come into existence until the commencement of the trial and it ends with the verdict.

The conclusion reached is that by the language "and shall not in any manner be disclosed to the jury" it was the intention of the Legislature that it should have application only to the time during which a case is being tried. Thus it must be said that under the terms of this section of the statute the defendant is entitled to no relief.

This leaves only for consideration the general question of whether or not there was any reasonable probability that a substantial right of the defendant independent of statute was impaired by the fact that members of the jury could have or did before or during the trial read in local newspapers accounts of the charge or charges against the defendant.

This question must be decided in the light of the facts and circumstances, as they have been disclosed, and recognized principles of law. One of these is: "A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed." Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380. See, also, Simmons v. State, 111 Neb. 644, 197 N. W. 398; Peterson v. State, 116 Neb. 268, 216 N. W. 823; Murray v. State, 119 Neb. 16, 226 N. W. 793.

Another statement of principle having application here is that in a situation where it is contended that because of unfavorable publicity through newspaper articles the defendant did not have a fair trial and on account thereof seeks to have a verdict of guilty set aside, the trial court has a large discretion in ruling on the question of prejudice. In each such instance the case must turn on its special facts. See, Holt v. United States, 218 U. S. 245, 31 S. Ct. 2, 54 L. Ed. 1021, 20

Ann. Cas. 1138; Marshall v. United States, 360 U. S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250.

In Schreiner v. State, 155 Neb. 894, 54 N. W. 2d 224, it was pointed out in an instance where a jury had used a dictionary that only such conduct of the jury as is calculated to prejudice the substantial rights of the defendant is ground for setting aside a verdict.

It has already been pointed out that there was information from each and all of the jurors that they had read nothing prior to the trial that would influence a verdict in the case. Neither at nor after the trial was anything presented by affidavit which carried any fact or inference that any juror was or could have been influenced by any kind or character of publication.

There are clippings from newspapers in the bill of exceptions which contain a statement of the charges against the defendant, but it is not made to appear that any of these were ever read by or called to the attention of the members of the jury or any of them either before or during the trial.

In the light of all this it may not well be said that the trial court failed to exercise a sound discretion in refusing to set aside the verdict and grant the defendant a new trial.

The judgment of the district court is affirmed.

AFFIRMED.

VIRGIL HERMANSEN, APPELLEE AND CROSS-APPELLANT, V. THE ANDERSON EQUIPMENT COMPANY ET AL., APPELLEES AND CROSS-APPELLEES, IMPLEADED WITH WINSLOW O. TILFORD, APPELLANT AND CROSS-APPELLEE.
117 N. W. 2d 791

Filed November 9, 1962. No. 35273.

1. **Witnesses: Trial.** **The credibility of witnesses and the weight of evidence are, in an action at law, for the jury and its verdict**

may not be disturbed by this court unless it is clearly wrong as a matter of law.

2. **Trial: Appeal and Error.** Disputed questions of fact in an action at law are by the verdict of the jury resolved in favor of the prevailing party and in deciding an appeal in the cause the evidence and reasonable inferences therefrom are required to be considered most favorably to him.
3. **Highways: Negligence.** The violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law but is evidence of negligence to be considered by the jury in connection with other circumstances in evidence.
4. **Automobiles: Negligence.** Whether one failed to look or looked and failed to see a motor vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching motor vehicle was within the limit of danger that reasonable minds could not differ thereon.
5. ———: ———. The driver of a motor vehicle is not required to notice every car that happens actually to be within his range of vision, but only those within that radius which denotes the limit of danger.
6. **Automobiles: Trial.** Before a verdict can be properly directed in such a case the position of the oncoming motor vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger, otherwise the question becomes one for the jury.
7. **Negligence.** The rule with reference to cause which will afford the basis for an action for damages for negligence is that the act must be a proximate cause of the accident and the ensuing injuries.
8. ———. A proximate cause is a cause without which the injury would not have occurred.

Appeal from the district court for Custer County: S. S. SIDNER, Judge. Affirmed in part, and in part reversed and remanded.

McGinley, Lane, Mueller & Shanahan, for appellant.

Roy E. Blixt and Baylor, Evnen, Baylor & Urbom, for appellee Hermansen.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SIMMONS, C. J.

This action is one for personal injuries and property damages arising as a result of an automobile and light truck collision within the city limits of Arnold and to the north of the paved portion of the east and west state highway. It happened about 4 p.m. on November 26, 1959. No unfavorable weather conditions are shown.

There were originally three defendants. The Anderson Equipment Company was dismissed from the action and its counterclaim put over for a trial to a succeeding jury. The action proceeded against Winslow O. Tilford, driver of the car, and Arnold Swanson Co., his employer. The defendant Tilford, hereinafter called the defendant, also cross-petitioned for damages. The jury found for the plaintiff on both plaintiff's claim and the defendant's claim. On motion for judgment notwithstanding the verdict, the judgment for the plaintiff was set aside on the ground that plaintiff was guilty of contributory negligence as a matter of law barring recovery. The trial court sustained the verdict insofar as the judgment in favor of plaintiff on defendant's cross-petition is concerned.

Defendant Tilford appeals and plaintiff cross-appeals.

We affirm the judgment of the trial court in denying a new trial to Tilford. We reverse the judgment of the trial court in setting aside the jury's verdict in favor of plaintiff and against the defendants and direct that judgment be granted the plaintiff on the jury's verdict.

We state the evidence in the light of the rule that: "The credibility of witnesses and the weight of evidence are, in an action at law, for the jury and its verdict may not be disturbed by this court unless it is clearly wrong as a matter of law. * * * Disputed questions of fact in an action at law are by the verdict of the jury resolved in favor of the prevailing party and in deciding an appeal in the cause the evidence and reasonable inferences therefrom are required to be considered most favor-

ably to him." Pueppka v. Iowa Mutual Ins. Co., 165 Neb. 781, 87 N. W. 2d 410.

The location of the accident was about 100 feet west of a filling station which was within the city limits and on the north side of a paved through state highway. The station had a gravel driveway to its pumps which lead from the highway. To the west of the station building and pumps was a graveled storage lot used by customers of the station. The lot and pump area was covered with gravel and connected with the highway to the south. Some loose gravel had gotten on the paved highway surface. To the east, a few hundred feet, was a hill so that the pavement sloped slightly to the west toward the station.

The movement of plaintiff's truck is not in dispute. He was driving from the west toward the east at a speed of 10 to 15 miles per hour and intended to go to the filling station to have a tire repaired. When west of the station, he looked to the west and east and saw no cars approaching. He gave no signal of an intent to turn. He turned left across the westbound lane of travel. He then saw defendant's car about 100 feet to the east and directly opposite the filling station pumps. His car was partly off the paved portion of the highway at that time. He proceeded northeast. Plaintiff testified that defendant's car came off the pavement and into the right side of his truck. The rear end of the truck was then about 14 feet north of the north edge of the pavement. The jury evidently accepted plaintiff's version of the accident.

Defendant asks us to apply the turning at a nonintersection rule which we said in Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355, was a movement "fraught with danger" and required a degree of care commensurate with the danger. Plaintiff was here moving across the westbound lane in what was more nearly an intersection turn. But plaintiff's failure to give any signal of an intent to turn was in violation of section 39-7,115,

R. R. S. 1943, and was in itself evidence of negligence. We stated in Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531: "This court has held many times that the violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law but is evidence of negligence to be considered by the jury in connection with other circumstances in evidence. * * *."

The timing of the movement of defendant's car and the movement itself is not at all clear or certain in the evidence.

Defendant Tilford testified that he approached the city limits at a speed of 60 miles per hour. The witness riding with him fixed it at 45 to 50 miles per hour. Defendant testified that he was going 30 to 35 miles per hour when he passed the filling station and was about 100 feet from plaintiff when he began his turn; that he then put on his brakes but the loose gravel prevented their operation and that he then accelerated his power drive to the limit and turned to the right as much as possible; pivoted on his right wheel; and in that way he hoped to miss hitting plaintiff. Defendant, apparently, wanted the jury to believe that he made this maneuver in 50 to 60 feet and had succeeded at it when plaintiff ran into him. Defendant testified that "40 or 50 feet before we would have passed him," plaintiff made a left turn "right in front of us"; that he then put on the brakes; and that he then accelerated his car and made the turn to the right. This evidence is in direct conflict with the testimony of the deputy sheriff as to skid marks and their length.

Defendant's witness, who was riding with him, testified that the abrupt turn of plaintiff was made less than 100 feet ahead of them. The witness then testified that defendant had applied the brakes *before* plaintiff made his left turn and that their intention was to stop in Arnold.

There is shown no speed limit by ordinance in Arnold.

Section 39-7,108, R. R. S. 1943, fixes the speed limit at 25 miles per hour under those circumstances. This is evidence of negligence sufficient to take the issue to the jury.

Defendant contends that plaintiff should have seen his car approaching and was required to notice his approach. We held in Pupkes v. Wilson, 172 Neb. 15, 108 N. W. 2d 220, that: "Whether one failed to look or looked and failed to see a vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching vehicle was within the limit of danger that reasonable minds could not differ thereon. * * * The driver of a vehicle is not required to notice every car that happens actually to be within his range of vision, but only those within that radius which denotes the limit of danger. Before a verdict can be properly directed in such a case the position of the oncoming vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger, otherwise the question becomes one for the jury."

Just when defendant reached the point where plaintiff was obligated to see him as "within that radius which denotes the limit of danger" is not at all certain in this record. On that issue, we have the directly opposite testimony of the plaintiff that when he started to turn, he looked and did not see the defendant. We have the conflicting statement of defendant and his own witness as to the location of plaintiff when defendant began to make the right turn and plaintiff made his left turn.

The city limits were about 600 feet east of the point of the accident. At that time, defendant's speed could have been found by the jury to be 60 miles per hour and that it was 30 to 35 miles per hour when defendant was 100 feet or less from the collision. All of this and other

testimony presented a question of negligence sufficient to take that issue to the jury.

In Palmer v. McDonald, 171 Neb. 727, 107 N. W. 2d 655, we held: "The rule with reference to cause which will afford the basis for an action for damages for negligence is that the act must be a proximate cause of the accident and the ensuing injuries."

Both plaintiff's cause of action and defendant's cause on the counterclaim, and the issue of contributory negligence, depend upon the question of proximate cause.

We have defined proximate cause over the years as follows: "Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred." Edmunds v. Ripley, 172 Neb. 797, 112 N. W. 2d 385. See, also, Jarosh v. Van Meter, *supra*.

In Cover v. Platte Valley Public Power & Irr. Dist., 173 Neb. 751, 115 N. W. 2d 133, in shorter and for that reason better language, we stated: "A proximate cause is a cause without which the injury would not have occurred."

This brings us to the crucial question of whose negligence could be found to be the proximate cause of this accident?

The jury could have found that at the time of the collision, the plaintiff's truck had completed its left-hand turn and was on the graveled apron leading to the storage lot. At that time, he was where he had a perfect right to be. At that time, the paved portion of the highway and 14 feet of graveled apron were open for travel by defendant. Plaintiff's evidence and pictures of his wrecked truck were to the effect that defendant ran into the right side of plaintiff's truck.

Defendant's testimony was that before the collision he had made the rather unusual maneuver of executing a U-turn at a high rate of speed which we have attempted

to describe. He wanted the jury to believe that he had succeeded at it and was headed north when plaintiff ran into his car. Pictures were taken of defendant's car, but were not produced at the trial.

On defendant's version of the event, he turned his car off the paved portion of the highway onto the graveled approach to the storage lot. Gravel on the pavement did not prevent his use of his brakes after he left the pavement for the last half of his trip, as evidenced by skid marks. On the contrary, he testified that he saw he "wasn't going to be able to stop in time to avoid a head-on collision, so I hit the accelerator, pushed it clear to the floorboard, with the wheel turned to the right as hard as I could. * * * and I tried to turn the car around to get away from him." In doing so defendant, if believed by the jury, put his car at a high rate of speed directly in the path of plaintiff's truck. But the jury did not accept that version of what happened.

The deputy sheriff's testimony was that the skid marks showed defendant's movement to be a curve to the right, about the first half on the pavement, the last half off the pavement, leading directly to the side of plaintiff's truck, and skid marks of plaintiff's truck pushed sidewise. He was corroborated generally by another witness and the picture of plaintiff's truck. Not to be overlooked here is the testimony of defendant's witness that defendant intended to stop in Arnold anyway and put on his brakes before plaintiff made his left turn.

The jury also could have found that the defendant was heading for the storage lot with his car out of control because of speed and was unable to stop in the 82 feet after he applied his brakes. The deputy sheriff who was at the scene of the accident measured skid marks 82 feet long beginning just west of the filling station. Defendant's witness put the "acceleration marks" at 35 to 40 feet and that before that the skid

marks were "something less than 60 or 65 feet." The skid marks and plaintiff's testimony are in direct conflict with defendant's testimony of distance and abrupt right-hand turn and being run into by plaintiff. The jury's verdict on that issue of fact must be accepted.

The jury could have found that the defendant was driving at an unlawful and excessive rate of speed. He testified to such a rate of speed. The evidence, likewise, presented an issue as to whether or not defendant was driving at a speed that permitted him to control his car. The defendant's evidence also presented a question as to whether or not he was maintaining a proper lookout.

On this evidence, we hold that the trial court erred in setting aside that part of the verdict and judgment awarding plaintiff damages from the defendant Tilford and his employer Arnold Swanson Co. The trial court did not err in sustaining the verdict denying defendant damages against the plaintiff.

The term point of impact is used throughout this testimony by the parties and their counsel. It was used by the sheriff at least three times with reference to the general course of the skid marks. The officer described the location of debris on the ground and the skid marks. Without objection, he testified that it was "plainly marked on the gravel where the point of impact was." He was then asked and testified to distances and measurements he made from three markers to the "point of impact." There was no objection. He was then asked what the point indicated at which the three measurements came together. Over objection that it was an invasion of the province of the jury, he testified that "it indicated the point of impact." It could hardly do anything else for it was already in evidence, without objection, that the three measurements terminated at the "point of impact." We find no prejudicial error in permitting the witness to state what he had previously

stated, without objection, was the "point of impact." We find no evidence to the contrary.

Defendant had nine assignments of error directed at the instructions. He submits them all together contending that there was no proof to support any of the allegations of negligence made against him and in submitting plaintiff's cause to the jury. These assignments all go to matters of the record where the jury found against him. We have in effect ruled on all of the propositions contained in them and in the brief argument defendant makes to support his assignments. We see no reason to do more.

We hold that the trial court did not err in denying defendant a new trial on his counterclaim. That part of the trial court's judgment is affirmed.

That part of the judgment setting aside the verdict of the jury is reversed, and the cause is remanded with directions to grant plaintiff a judgment against the defendants based on the jury's verdict.

All costs in this court are taxed to the defendant Tilford.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

HERMAN HAARBERG, APPELLEE, V. OLIVER SCHNEIDER, APPELLANT.
117 N. W. 2d 796

Filed November 16, 1962. No. 35213.

1. **Fraud: Damages.** In an action for damages for fraud and misrepresentation the measure of damages is the difference between the value of the article or thing if it had been as represented and its actual value.
2. **Damages: Appeal and Error.** When a certain theory as to the measure of damages is relied upon by the parties in the trial court as the proper one, it will be adhered to on appeal whether correct or not.
3. **New Trial: Appeal and Error.** Where a motion for a new trial

presents a question of fact as to the regularity of the proceedings, the trial court becomes the trier of the facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong.

Appeal from the district court for Red Willow County: VICTOR WESTERMARK, Judge. Affirmed.

William W. Lyons, for appellant.

Daniel E. Owens, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an action brought by Herman Haarberg against Oliver Schneider for damages sustained as a result of false representations made by Schneider to Haarberg in selling an automobile to Haarberg. The jury returned a verdict for the plaintiff in the amount of $1,083.34 and defendant has appealed from the judgment entered thereon.

The evidence shows that Haarberg is a farmer, 49 years of age, who has resided in Chase County all his life. Schneider is a new and used car dealer who has had a place of business in McCook, Nebraska, for the past 25 years. On September 9, 1960, Haarberg purchased a 1960 Chevrolet 4-door Corvair automobile from Schneider for which he paid $2,502.50, $950 in cash and the balance by a trade-in allowance of $1,552.50 on his 1955 Oldsmobile automobile.

Schneider had obtained the Corvair from Lester Buzzell, an automobile dealer in Cambridge, Nebraska, in June 1960. Buzzell testified that at the time he transferred the Corvair to Schneider, it had been driven more than 7,000 miles and the speedometer so showed. When Schneider transferred the Corvair to Haarberg the speedometer showed that it had been driven 800 miles, a manufacturer's suggested retail list price was attached to a rear window, and the invoice given to Haarberg

showed it was a "new" car sold on an "as is" basis. Schneider's wife testified that she made out the invoice and that she inserted "NEW" in the "New or Used" car designation by mistake. Schneider testified that when he obtained the automobile from Buzzell the speedometer was defective. He did not remember the mileage shown at that time. After its repair the mileage showed zero. Schneider and members of his family had driven the automobile during the period of Schneider's possession, which accounts for the 800 miles showing on the speedometer at the time of its sale to Haarberg.

Haarberg and his son Ronald examined the Corvair a few times before the sale was made. Both testified that Schneider represented the Corvair as a new automobile and that the speedometer correctly showed the mileage the Corvair had been driven so far as he knew. They testified also that Schneider stated that the "break-in" oil was still in the Corvair's motor and that it should have its 1,000 mile check-up when the speedometer showed 1,000 miles. Haarberg testified that he believed the representations made and relied on them when he purchased the car. Haarberg and Ronald both testified that while they were driving the Corvair home, following its purchase, the motor "cut-out" a few times and the speedometer stuck. They complained to Schneider who told them that the General Motors Company warranty was in effect and that they should take the matter up with that company. This they did and were informed that the one-year warranty had expired and that the General Motors Company had no obligation in the matter. Ronald Haarberg testified that the valve lifters stuck and the heater went out in November 1960 when he was driving the car in Brighton, Colorado. In late December the motor stuck or was burned out, and the car has not been used since. Herman Haarberg testified that the Corvair had an actual value of $1,400 to $1,500 when he purchased it. Ronald Haarberg testified that its value at that time was from $1,000 to

$1,200. There is no evidence in the record of the value of the Corvair at the time of its sale to Herman Haarberg if it had been as represented.

Schneider testified that he knew the Corvair had been used as a demonstrator, that he had the speedometer repaired, and that it showed no mileage when it was replaced in the car. He said that he never told Haarberg that the car was a new car and that he made no statement as to the number of miles the Corvair had been run. He admits that the manufacturer's suggested retail list price was on it just as it was when he received the automobile from Buzzell. Schneider's contention is that the deal was made at arms-length, that Haarberg examined the car and drove it, and that Haarberg knew that it was a used car.

We think a jury question was presented. The invoice delivered to Haarberg showed it to be a new car, and the price was the new car list price. The speedometer indicated that the Corvair had been driven only 800 miles, when Schneider knew that it had been driven 7,000 miles in addition thereto. He permitted Haarberg to assume that the car was new by leaving the manufacturer's suggested retail list price on it without explanation. These implied representations, together with the testimony of Herman and Ronald Haarberg, were sufficient to sustain the verdict of the jury. Trebelhorn v. Bartlett, 154 Neb. 113, 47 N. W. 2d 374; Herlan v. Bleck, 148 Neb. 816, 29 N. W. 2d 636; Dargue v. Chaput, 166 Neb. 69, 88 N. W. 2d 148. No contention is made that the trial court did not properly instruct the jury on the elements of fraud and misrepresentation essential to establish a cause of action.

The defendant assigns as an error the giving of instruction No. 11 which states in part: "In the event you find for the plaintiff the measure of plaintiff's damages in this case is the difference between the price paid by the plaintiff and the fair and reasonable market value of said automobile as it was on or about September 9,

1960." Plaintiff's petition alleged the sale price to be $2,502.50 and the value of the Corvair to be $1,000 at the time of the sale. The correct measure of damages is the difference between the value of the Corvair if it had been as represented and its actual value at the time of sale. Rankin v. Bigger, 128 Neb. 800, 260 N. W. 202. The petition did not allege the proper measure of damages. The court instructed on the measure of damages on the theory set out in plaintiff's petition. Defendant asserts this as error.

Plaintiff contends that the case was tried by both parties on the theory set forth in plaintiff's petition and that defendant cannot now complain. It is the rule that when a certain theory as to the measure of damages is relied upon by the parties in the trial court as the proper one, it will be adhered to on appeal whether it is correct or not. Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275.

In the instant case, the petition was not attacked by motion or demurrer for failure to allege the proper measure of damages. The defendant asserts, however, that he made a motion for a directed verdict which had the effect of raising the question. The motion was: "The defendant at this time moves the Court for a directed verdict on the ground that the plaintiff has not shown sufficient evidence to sustain his petition." It will be observed that the form of the motion for a directed verdict is consistent with the measure of damages alleged in the petition. We think the case was tried on the theory that the measure of damages set out in the petition was the correct one and that the decision of the case is controlled by our holding in Welch v. Reeves, *supra*. The case having been tried by both parties on the measure of damages stated in plaintiff's petition, we shall adhere to that theory on this appeal, although it is not a correct one.

Defendant contends that a quotient verdict was returned by the jury and that a new trial should be

awarded for that reason. A quotient verdict is one where the jurors for the purpose of arriving at a verdict agree that each should write on his ballot a sum representing his judgment; that the aggregate should be divided by twelve; that they will be bound by the result; and that the quotient shall be the verdict. Killion v. Dinklage, 121 Neb. 322, 236 N. W. 757. Such verdicts are generally recognized as being invalid.

Three jurors were called as witnesses to establish that the verdict was a quotient one. The first testified that he could not remember everything about it but that each put down an amount and "I guess" we divided it and arrived at it that way. He testified that there was no prior agreement that the amount arrived at would be the verdict in the case and he could not remember if a subsequent vote was taken. The second juror remembered the action of the jury about the same as the first juror called. She testified that there was no agreement ahead of time to be bound by putting down an amount and she in fact testified that she did not know "that we divided by 12." The third juror testified that the jury could not arrive at an amount and someone suggested that each give the figure he thought to be correct and they would take an average of it. It was her "understanding" that the average amount would be the verdict. She testified someone said: "We should lump it off to an even thousand," and someone answered "No, it was going to be an average." She testified that no additional vote was taken.

The foregoing evidence indicates that each juror submitted a figure which was his estimate of the damages sustained by the plaintiff. There is no evidence of any prior agreement to be bound by the average of these amounts. There is evidence of a suggested change in the amount so found. While one juror said that no subsequent vote was taken, the evidence indicates that the amount of the verdict was the individual verdict of each. When a new trial is sought on the ground of misconduct

by the jury, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing. Where a motion for a new trial presents a question of fact concerning the regularity of the proceedings, the trial court becomes the trier of disputed facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong. Schwank v. County of Platte, 152 Neb. 273, 40 N. W. 2d 863; Pope v. Tapelt, 155 Neb. 10, 50 N. W. 2d 352. The evidence is sufficient to sustain the finding of the trial court and under the foregoing holdings such finding will not be disturbed.

We conclude that the judgment is free from prejudicial error and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL, RELATOR, V. FRANK SORRELL, RESPONDENT.
117 N. W. 2d 872

Filed November 16, 1962. No. 35241.

1. **Officers.** A violation of section 53-111, R. R. S. 1943, affords an adequate basis for a charge upon which an order of removal by the Governor can be based.
2. **Constitutional Law: Officers.** The power of the Governor to remove an officer of the executive branch of the government, appointed for a definite term, requires a sufficient specification of charges, notice, hearing, and adequate competent evidence to sustain the order made.
3. **Officers.** An officer exercising quasi-judicial functions may act in a proceeding where he is disqualified by interest, relationship, or bias, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would prevent absolutely a determination of the proceeding.
4. **Witnesses: Evidence.** The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be put in evidence through the device of offering evidence which is known or should be known to be

adverse in order, under the name of impeachment, to get before the trier of fact a favorable ex parte statement otherwise inadmissible.

5. Master and Servant. The word "employment" as used in section 53-111, R. R. S. 1943, refers to a status and relationship and not to the nature of the benefit received.
6. Judgments. A declaratory judgment action will not be entertained if there is pending, at the time of its initiation, another action or proceeding in which the same parties are involved and in which the same issues may be adjudicated.
7. Constitutional Law: Officers. If there is evidence to support the decision of the Governor in removing an officer where a hearing is required, and the cause for removal is one on which the Governor is authorized to act, his decision on disputed facts is conclusive; and if he acts within his jurisdiction the courts will not, under the above circumstances, inquire into the weight and credibility of the evidence to support the charge, but will regard the finding of the Governor as final and not subject to review by the courts.

Original action. Judgment of ouster.

Clarence A. H. Meyer, Attorney General, and John E. Wenstrand, for relator.

Ginsburg, Rosenberg & Ginsburg and Norman M. Krivosha, for respondent.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an original action in quo warranto instituted by the Attorney General to test the right of respondent, Frank Sorrell, to hold the office of member of the Nebraska Liquor Control Commission.

The respondent was appointed a member of the commission and assumed the office on May 25, 1959. The term was for a period of 6 years as provided by section 53-106, R. R. S. 1943. No contention is made as to the regularity of the appointment or that respondent failed to qualify for the office in the manner required by law.

On November 29, 1961, the Governor of Nebraska, after giving notice thereof to respondent, began a hear-

ing to determine whether or not respondent should be removed from the office of liquor control commissioner for violating section 53-111, R. R. S. 1943, in that he was employed by persons engaged in the liquor business, to-wit: Helen Giittinger and Lloyd Copenhaver, while he was holding the office of liquor control commissioner. On January 24, 1962, after the completion of the hearing, the Governor directed the removal of respondent as a member of the commission. Respondent refused to surrender the office, and this action in quo warranto was brought to determine by what warrant, if any, the respondent now holds the office of liquor control commissioner.

The respondent for many years before becoming a member of the Liquor Control Commission was engaged as an auctioneer, real estate broker, and loan agent at Syracuse, Nebraska. He was well acquainted with Lloyd Copenhaver, who held a license to sell beer, issued by the Liquor Control Commission, and operated Cope's Tavern in Syracuse. He was also well acquainted with Helen Giittinger, who held a license to sell package liquor issued by the commission, and who, with her husband Fred Giittinger, operated a business under the name of H. G. Sundries in Talmage, Nebraska. On October 15, 1961, a tavern, on and off sale, beer only, in Syracuse, Nebraska, was advertised for sale in the Omaha World-Herald over the name of the respondent. It is not disputed that the tavern advertised was that of Lloyd Copenhaver. On April 27, 1961, the business of H. G. Sundries in Talmage, including its package liquor business, was advertised for sale over the name of respondent and Mr. and Mrs. Fred Giittinger. These advertisements and the apparent connection of the respondent therewith resulted in a notice and hearing before the Governor on the alleged violation of section 53-111, R. R. S. 1943. The authority of the Governor to hold a hearing after notice, and to remove a member of the Liquor Control Commission if cause is found to exist,

is discussed and decided in State ex rel. Beck v. Young, 154 Neb. 588, 48 N. W. 2d 677, and we shall not repeat the holding of that case.

It is provided in section 53-111, R. R. S. 1943, in part as follows: "No commissioner * * * shall solicit or accept any gift, gratuity, emolument or employment from any person subject to the provisions of this act, * * * and every such person * * * is hereby forbidden to offer to any commissioner * * * any gift, gratuity, emolument or employment. If any commissioner * * * shall violate any of the provisions of this section, he shall be removed from the office or employment held by him."

On November 10, 1961, the Governor caused a notice to be served on respondent requiring him to show cause on November 29, 1961, why he should not be removed from office on the following charge: "The specific charge against you is that you were employed by persons engaged in the liquor business in violation of Section 53-111, R. R. S., 1943, to-wit, Helen Giitenger and Lloyd Copenhaver, while holding the office of State Liquor Commissioner." It is the contention of respondent that the charge was too indefinite to apprise the respondent of the dereliction of duty with which he was charged. There is no merit in this contention. A respondent in a case such as this is not entitled to the same degree of exactness required in court pleadings in stating the charge, although it should be specifically stated with reasonable certainty. Sharps v. Jones, 100 W. Va. 662, 131 S. E. 463. In the instant case, the respondent was charged with having been employed by Helen Giittinger and Lloyd Copenhaver, persons in the liquor business, while he held the office of liquor control commissioner. The charge states the nature of the offense and the name of the persons involved with him. The charge is in the language of the statute and the persons involved are named. The charge is sufficient.

In a hearing conducted by the Governor under the provisions of Article IV, section 12, Constitution of Ne-

braska, and section 53-111, R. R. S. 1943, the charge must be reasonably definite, notice of hearing must be given, an opportunity to defend afforded, and there must be evidence to sustain a ground for removal as specified in the statute. Whether or not these requirements are met is, in a final analysis, a question for the courts. State ex rel. Beck v. Young, *supra*.

It is contended that the Governor in conducting the proceedings did not afford a fair and impartial hearing. The motives of the Governor, or apparent bias and prejudice, if shown, in the discharge of his duty as such, are not the subject of inquiry by the court in this proceeding. State ex rel. Churchill v. Hay, 45 Neb. 321, 63 N. W. 821. The right of a fair and impartial hearing before administrative officers exercising quasi-judicial functions as well as in the courts is generally recognized as one growing out of constitutional guarantees. There is an exception to this rule which is designated in applicable cases as a rule of necessity. Under this rule an officer exercising quasi-judicial functions may act in a proceeding where he is disqualified by interest, relationship, or bias, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would prevent absolutely a determination of the proceeding. Emerson v. Hughes, 117 Vt. 270, 90 A. 2d 910, 34 A. L. R. 2d 539. See, also, 42 Am. Jur., Public Administrative Law, § 22, p. 312; 67 C. J. S., Officers, § 66d, p. 276; Annotation, 39 A. L. R. 1476.

The licensees, Helen Giittinger and Lloyd Copenhaver, did not testify. Prior to the hearing respondent submitted affidavits by each of them to the Governor in an attempt to induce the Governor not to proceed with the hearing. At the commencement of the hearing the Governor made a statement as to the reasons for the hearing in which he read the two affidavits previously submitted by the respondent. They were not offered in evidence by the Attorney General. During the presentation of his case-in-chief the Attorney General offered

in evidence written statements signed by the two licensees which statements were objected to by respondent as being incompetent. It was contended that these statements were offered for impeachment purposes only. The statements were admitted in evidence. Thereafter the respondent offered in evidence two different affidavits of the licensees to rebut the two written statements placed in evidence by the Attorney General. The statements offered were to impeach the affidavits which must be treated as having been offered by the Attorney General or which were not in evidence at all. In either event, we think the objections to these statements and affidavits should have been sustained under the holding of Wilson v. State, 170 Neb. 494, 103 N. W. 2d 258, which is: "The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made." We shall not, therefore, consider the affidavits and statements referred to in considering the case.

Donald E. Shasteen, a newspaper reporter for the Omaha World-Herald, testified that he called the respondent by telephone on October 28, 1961, regarding the advertisement over his name for the sale of the property of the licensee Copenhaver involved herein. He testified that respondent said he was a licensed real estate broker and that he was acting in that capacity in placing the advertising. He quoted the respondent as saying that he had not solicited the listing and that the property had not been sold; that his relationship as real estate broker would not constitute employment by the tavern owner within the meaning of the state law; and that he was surprised that someone would try to make something out of nothing. Other statements were made indicating that respondent was participating in some

manner in the sale of the property of the licensee.

Frank Rall, a newspaper reporter for the Lincoln Journal, testified that he called respondent on the evening of October 28, 1961, with reference to the advertisement offering the property of licensee Copenhaver for sale. He testified that respondent said he was in the real estate business, that the building listed with his firm was a tavern, that he did not solicit it, and that he knew commissioners cannot solicit for bonds or business. He further stated that he did not intend to violate the law, that he did not sell the property, and that someone is trying to make a mountain out of a molehill.

The respondent vehemently denied he told the two newspaper reporters that he had listed the property or that he had any arrangement to sell the property. He is corroborated in this by his son and wife, who respectively heard his statements made over the telephone to Shasteen and Rall.

Respondent testified that he was called by Copenhaver and Fred Giittinger, the husband of Helen Giittinger, and asked to sell their properties. He stated to each of them that he could not do so because of his membership on the Liquor Control Commission, but that he would help them to find a buyer as a matter of friendship. He admitted that the advertisements were prepared in his office and that he paid for the advertising. He stated that he has never billed the licensees for this expense and that he had no intention of doing so. He testified that he had no listing agreement or any other arrangement with either of the licensees to sell their properties, and that his connection with these matters was gratuitous and nothing more than acts of friendship toward long-time friends.

The evidence shows that respondent was asked, when undertaking to serve someone, if he entered into a listing agreement whenever he undertook to sell somebody's property or business. His answer was: "We have to before we can advertise it."

It is the contention of the respondent that the evidence does not show that he solicited or accepted "employment" within the meaning of section 53-111, R. R. S. 1943. He contends that the term "employment" as contained in the statute is used in the sense of benefit and is simply an extension of the various ways that benefits can be rendered, that is by gift, gratuity, emolument, and the like. From this the respondent argues that a gratuitous employment is not violative of the statute since he neither solicited nor accepted anything from the licensees. While the argument is an ingenious one, its logic is not overwhelming. It is the status and relationship that is condemned, not the nature of the benefit received. It would require a strained interpretation of the statute to hold that a commissioner could not solicit nor accept employment but that he could accept it on a gratuitous basis. Whether or not respondent was employed to perform a service for the licensees is a question of fact. In considering the evidence of the witnesses Shasteen and Rall, it will be noted nothing was said by the respondent that he was performing gratuitous acts for the licensee. The trier of facts could well find from all the facts and circumstances that the gratuity phase of the case was an afterthought to meet the exigencies of the litigation. We think there is competent evidence in the record sufficient to sustain the findings made by the Governor. True, the evidence is in direct conflict, but this can avail the respondent nothing under applicable rules.

The general rule is: If there is evidence to support the decision of the Governor in removing an officer, and the cause for removal is one on which the Governor is authorized to act, his decision on disputed facts is conclusive; and not only is this so, but if he acts within his jurisdiction the courts will not, under the above circumstances, inquire into the weight and credibility of the evidence to support the charge, but will regard the finding of the Governor as final and not subject to

review by the courts. Mathews v. Hedlund, 82 Neb. 825, 119 N. W. 17; Munk v. Frink, 81 Neb. 631, 116 N. W. 525, 17 L. R. A. N. S. 439; People ex rel. Johnson v. Coffey, 237 Mich. 591, 213 N. W. 460, 52 A. L. R. 1; Craig v. Jensen, 66 S. D. 93, 278 N. W. 545.

A further contention is advanced that the statute contemplates the rendition of service to licensees and to hold otherwise would reduce the statute to an absurdity. We quite agree with respondent that the Liquor Control Commission shall render service to the state and licensees alike in the administration of the Liquor Control Act. But this is far different from a case where a commissioner renders personal service to a licensee which is wholly disconnected from his duty as a public officer. The distinction is so plain that we shall not dignify this contention by further discussion.

It is further contended that a declaratory judgment action filed in the district court for Lancaster County prior to the hearing by the Governor, and amended after the Governor's removal order to allege such additional proceedings, has the effect of depriving this court of its original jurisdiction in quo warranto. This contention appears to have been previously settled by this court. In Phelps County v. City of Holdrege, 133 Neb. 139, 274 N. W. 483, we said: "The declaratory judgment law is not a substitute for new trial or appeal, nor does it operate to supersede former adjudications or proper proceedings already pending in a court having jurisdiction of parties and subject-matter." In Strawn v. County of Sarpy, 146 Neb. 783, 21 N. W. 2d 597, this court said: "'* * * the rule * * * seems to be that jurisdiction of a declaratory judgment action will not be entertained if there is pending, at the time of the commencement of the declaratory action, another action or proceeding to which the same persons are parties, in which are involved and may be adjudicated the same identical issues that are involved in the declaratory action.' Annota-

tion, 135 A. L. R. 934." The contention of respondent on this point is without merit.

The purpose of section 53-111, R. R. S. 1943, is set forth in State ex rel. Beck v. Young, *supra,* in the following language: "By section 53-111, R. S. 1943, the Legislature evidenced an intention to prohibit a member of the liquor control commission to deal with persons subject to the regulation and control of the commission. * * * The purpose of the statute is to remove the temptation on the part of a commissioner to use his influence with those under the regulation and control of the commission for private gain. Experience shows that to permit such dealings has a tendency to create partiality and discrimination on the part of the officer in administering the functions of his office. It involves a question of public morals in the administration of government of which the supreme executive power could properly take cognizance in the performance of his constitutional duty to take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered."

The record shows that respondent had notice, a specification of charges, and a hearing, all in accord with legal requirements. There is competent evidence in the record to sustain the charges made. The order of removal is regular and binding. The respondent, therefore, has not been an occupant of the office of liquor control commissioner since the issuance of the order of removal by the Governor. A judgment of ouster against the respondent is hereby entered. A proper writ is allowed to enforce the order of this court if it be necessary.

JUDGMENT OF OUSTER.

STATE OF NEBRASKA EX REL. DAWSON COUNTY FEED PRODUCTS, INC., A CORPORATION, APPELLEE, V. OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT, CITY OF FREMONT, NEBRASKA, A MUNICIPALITY, INTERVENER-APPELLANT, UTILITY SECTION OF THE LEAGUE OF NEBRASKA MUNICIPALITIES, AMICUS CURIAE.
118 N. W. 2d 7

Filed November 16, 1962. No. 35259.

1. **Electricity: Statutes.** By virtue of the language contained in section 70-401, R. R. S. 1943, and the history of the provision, the right to obtain service from persons, associations, or corporations, operating electric transmission lines outside the limits of incorporated cities or villages, extends to all persons, associations, and corporations residing within the statutorily described territory.
2. ———: ———. The origin of the history which makes this so is contained in the declaration of intent contained in the title of chapter 170, Laws 1923, page 403, which declaration has not been changed by later legislative action or judicial determination.
3. **Statutes.** In the adoption of legislation it must be presumed that the Legislature had in mind all previous legislation on the subject.
4. ———. Resort to the title to a previous act is properly available for the purpose of ascertaining legislative intent.
5. **Public Utilities.** Where two public service corporations are occupying the same area and rendering service therein, the obligation to serve is upon the one from which service is requested.
6. **Electricity: Statutes.** Chapter 336, Laws 1961, page 1046 (sections 70-901 to 70-905, R. S. Supp., 1961), does not destroy or impair the obligations imposed and rights declared by section 70-401, R. R. S. 1943.
7. ———: ———. All of the obligations imposed and rights declared by section 70-401, R. R. S. 1943, are specifically preserved by section 70-667, R. R. S. 1943.
8. **Mandamus.** Mandamus is the proper procedure to compel a public service corporation to furnish service.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Fraser, Stryker, Marshall & Veach and Tracy J. Peycke, for appellant Omaha Public Power Dist.

Sidner, Lee, Gunderson & Svoboda, for intervener-appellant City of Fremont.

Stewart & Stewart, for appellee.

Perry & Perry, for amicus curiae.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This action was instituted by the State of Nebraska on relation of Dawson County Feed Products, Inc., a corporation, relator. By the action the relator sought a writ of mandamus for the purpose of requiring Omaha Public Power District, a public corporation, respondent, to furnish to relator all necessary electrical energy and electricity required in the construction and operation of its plant on certain described real estate in Dodge County, Nebraska, about 1 mile north of the city limits of the city of Fremont, Dodge County, Nebraska, the purpose of which plant was the blending and storage of alfalfa pellets. The City of Fremont, Nebraska, became an intervener for the purpose of responding to and defending against the application of the relator for the writ of mandamus.

The action was tried to the court and at the conclusion of the trial a judgment was rendered granting the writ of mandamus prayed for by the relator. Separate motions for new trial were filed by the respondent and intervener. These were overruled. From the ruling on these motions and the judgment the respondent and intervener have appealed.

As grounds for reversal the respondent and the intervener have set forth in their briefs numerous assignments of error. For reasons which will become apparent later herein these do not require separate recognition or consideration. The case has been briefed at length by the parties and by the League of Nebraska Municipalities as amicus curiae, but the basic matter for determina-

tion is the true present meaning of section 70-401, R. R. S. 1943, and proper application of that meaning to the issues which have been presented by the record in this case.

The pertinent part of the statute is the following: "All persons, associations or corporations engaged in this state in the generating or transmitting of electric current for sale, or both, for power or other purposes, where the person, association or corporation operates an electric transmission line outside of the limits of incorporated cities or villages, shall furnish facilities, accommodations and service * * * upon application, to (1) any individual or any person who may reside in a territory which may be served by an electric transmission line and who may apply for physical connection and service; * * *." There are other provisions in this and succeeding sections of the statute but they do not appear to have controlling significance as to issues in this case.

The relator contends that under this statutory provision and the pertinent facts it was and is entitled to the relief granted by the judgment of the district court.

A summary of the petition of the relator, to the extent necessary to be set out herein, is that the relator is a corporation organized and existing under the laws of the State of Nebraska, with its principal place of business in Lexington, Dawson County, Nebraska, and engaged in the business of processing alfalfa and the storage of alfalfa products; that the respondent is a public corporation with its principal place of business in Omaha, Douglas County, Nebraska, and engaged in the business of generating, transmitting, and selling electrical energy and electricity to the public; that the relator is the lessee of certain real estate 450 feet by 500 feet in dimensions in Section 11, Township 17 North, Range 8 East of the 6th P.M., in Dodge County, Nebraska, which real estate is about 1 mile north of the city limits of the city of Fremont, Dodge County, Nebraska, it being on

the right-of-way of the Chicago, Burlington & Quincy Railroad Company; that on this real estate the relator intends to and is constructing a plant for the purpose of blending and storage of alfalfa pellets; that in the construction and operation of the plant it is necessary to use electrical energy; that the respondent owns and operates an electrical transmission line located upon the public road right-of-way immediately to the north of this leased real estate; that the respondent furnishes electrical energy to rural and other customers in the immediately surrounding vicinity; that the relator desires to purchase electrical energy from the respondent for the construction and operation of the plant; and that relator requested that it be furnished and offered to pay therefor the regular industrial rates established by the respondent, and also offered to comply with reasonable rules, regulations, and conditions of the respondent, but that the request of the relator was refused.

On the basis of this refusal, which the relator contends was willful and wrongful, the relator made the application for the writ of mandamus which was awarded.

It is stipulated that the real estate of the relator is three-fifths of a mile north of the north line of the city of Fremont.

Other pertinent facts pleaded and which are not in dispute are that the intervener is a legally organized and operating municipality which through a board of public works, under proper authority, has developed an electric power system having exclusive rights to generate and distribute electrical energy within the city limits of Fremont; and that by virtue of contract it furnishes electrical energy to certain territory adjacent to the city of Fremont under the natural and inherent rights of the city to expand its electrical load to the expanding suburban and fringe area of the city, which area potentially is subject to annexation and which is subject to zoning and building regulations, within a one-mile

limit pursuant to the provisions of sections 16-901 to 16-904, R. R. S. 1943. The intervener has and does serve customers at locations within a not clearly defined or described area, although in an area of several miles, in which the plant of the relator is located. Likewise the respondent serves customers at locations within this same area.

It is pointed out here that the rights of the two parties to so serve the area are not controverted. It is further pointed out that the real question is not that of which had the right to serve under the circumstances, but rather that of which, if either, had the right to refuse to serve, more particularly stated, that of whether or not the respondent had the right to refuse.

Some of this service has been rendered over a period of years and some of it is of recent origin. Present determination of which shall furnish requested service depends upon private agreement in each separate instance of application for service between the respondent and the intervener. No formal agreement in relation to this subject has come forth and it has not been pointed out that there is any such agreement.

The date or character of the request or demand for service and that of its refusal do not appear, but the parties make no point of this.

After the demand and refusal the relator obtained the necessary electric service from the intervener. The electric current supplied to the relator was delivered first to the intervener by the respondent and by the intervener to the relator. The estimated cost of the current from the intervener was $1,193.50 a month, whereas the estimated cost, if it had been obtained from the respondent, would have been $962.50 a month.

It is stated here that it is not urged that the relator has, by obtaining the needed service from the intervener after denial thereof by the respondent, waived any right, if it had any right, to the service requested of the respondent.

As has been indicated the relator predicated its claimed right to service on the portion of section 70-401, R. R. S. 1943, which has been quoted. The defense made by the respondent and the intervener is in substance and effect that this provision does not declare the right which was awarded to the relator by the judgment of the district court, in consequence of which they contend that the writ of mandamus was erroneously issued.

It is urged by the respondent that section 70-401, R. R. S. 1943, has no application in an instance such as this where an industrial plant seeks service from it. The position taken by the intervener supports this theory.

To support this theory the respondent urges substantially that by the language employed in the section, a party having the status of the relator is not entitled to the benefits of the statute. The statute provides that "(1) any individual or any person who may reside in a territory which may be served by an electric transmission line" outside of the limits of incorporated cities or villages shall be entitled, on conditions imposed by the statute, to the service described. The relator, it is contended, is not an individual or person residing in the territory wherein service is sought, hence service can with impunity be refused.

The position of the relator is that no such narrow interpretation was intended by the Legislature. Its position is that the words used extend to any natural or artificial person or entity having need of the service. This question does not appear to have been directly passed upon by this court since section 70-401, R. R. S. 1943, came into being.

This provision in its present substance came into being by the enactment of chapter 170, Laws 1923, page 403. It was amended with but one change in substance by chapter 143, Laws 1925, page 374. By this change the right to service was extended to "any individual or any person who may reside in a territory which may be served by an electric transmission line" whereas the

provision of the 1923 act extended service only to "any individual or any person who may reside along or immediately adjacent to such an electric transmission line." Slight and insignificant changes are found in the section which appears as section 70-501, Comp. St. 1929, and also in the present revision.

The provision by its terms imposes a mandatory duty and obligation upon those engaged in generating and transmitting electric current for sale in the state to furnish electric current. It confers a right to receive current, and it appears reasonably from the language of the entire statute that the intent of the Legislature was that the right to receive current was conferred upon persons and individuals within the broad and not the narrow meaning of those terms contended for by the respondent and the intervener. Such intent could not be regarded as inconsistent with the terms of the statute. Moreover, in Miller v. Iowa-Nebraska Light & Power Co., 129 Neb. 757, 262 N. W. 855, a case not in point on any issue presented here except the intent of the Legislature in 1923 in the enactment of this provision, it is said: "The principal object and purpose of this act was to require persons, associations, companies and corporations, * * * to furnish physical connection between their power lines to properties near or adjacent thereto outside the limits of incorporated cities and villages."

In addition to all of this the Legislature by the title to the act of 1923 left no doubt of its intention. The declaration is contained in the title as follows: "AN ACT to provide that electric transmission lines and power companies of Nebraska shall afford and give to all persons, associations and corporations upon reasonable and equal terms, service facilities and physical connection to their lines running between cities and villages within this state, and to provide for the enforcement of the provisions of this act."

It is of course true that this title is not the title of

the act of 1925 and it is not the title to the revisionary act or acts directly leading to section 70-401, R. R. S. 1943, but it is an unchanged part of the history of the provision. This is history which it is proper to examine for the purpose of determining the legislative intent. In Omaha Nat. Bank v. Jensen, 157 Neb. 22, 58 N. W. 2d 582, it was said: "In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act."

In Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A. L. R. 1688, it was said: "The legislature must be presumed to have had in mind all previous legislation upon the subject, so that in the construction of a statute we must consider the pre-existing law and any other acts relating to the same subject." See, also, Chicago & N. W. Ry. Co. v. Bauman, 132 Neb. 67, 271 N. W. 256. Also by the holdings in the following cases it is made clear that resort to the title of the act of 1923 is properly available for the purpose of ascertaining the legislative intent inhering in section 70-401, R. R. S. 1943: Hansen v. Dakota County, 135 Neb. 582, 283 N. W. 217; McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., 159 Neb. 703, 68 N. W. 2d 608; Yeoman v. Houston, 168 Neb. 855, 97 N. W. 2d 634; State ex rel. Bottolfson v. School Board, 170 Neb. 417, 103 N. W. 2d 146; Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397.

The conclusion reached is that it must be said that the relator was included within the classes named and described in section 70-401, R. R. S. 1943.

The respondent as ground of resistance of the relator's request asserts that its service is in the nature of a public offering and it is not bound to serve beyond the area and customers embraced in its offering. Factually, a matter conceded by the presentations of the respondent and the intervener, this area is within the

area of the public offering of the respondent. It is within the offering area of both the respondent and the intervener. It is pointed out in the record by the two parties that when an application is received by either they decide at the time and without agreement with the applicant and without reference to any statutory authority which shall perform the service.

In a situation such as this, under section 70-401, R. R. S. 1943, where two parties are occupying the same service area, the obligation to serve a particular customer in the area depends upon and is required of the one upon which the request is made.

The next proposition urged by the respondent and also the intervener as ground for reversal of the judgment herein is in effect that the agreement between the respondent and the intervener whereby the respondent refused to comply with a request for service became, under chapter 336, Laws 1961, page 1046 (sections 70-901 to 70-905, R. S. Supp., 1961), a valid agreement and therefore the relator was not entitled to relief under the terms of section 70-401, R. R. S. 1943.

Neither the provisions of this chapter of the statute nor the authorities cited support the contention of these parties. The statute in nowise contravenes the substantive rights and obligations declared by section 70-401, R. R. S. 1943, or any other declaration of substantive right in the field of electric current. It calls attention to defects in the field of production and distribution of electric current and points to corrective measures which may and should be employed, but at no point does it command the performance of any act or practice the effect of which would destroy or impair the rights and duties defined by section 70-401, R. R. S. 1943.

This is not to say that if the Legislature had implemented the commentary contained in chapter 336, Laws 1961, page 1046, such implementation would have been futile. The statement here is that it did not do so. Clearly there is nothing in this chapter which impairs

any rights of users of electricity or duties of producers thereof under section 70-401, R. R. S. 1943.

This is a sufficient answer to the proposition that mandamus may not issue the result of which would frustrate and defeat a legislative program and a declared public policy. The act did not declare a tangible or substantial legislative program or public policy.

The respondent is a public power district within the meaning of sections 70-601 to 70-603, R. R. S. 1943, and the intervener is a municipality which operates a plant for the production and distribution of electric current as a public utility, to the extent necessary to mention here, the same as a public power district. As to this there is no dispute. The two furnish electric current in the area adjacent to the plant of the relator. The right to do this is not questioned. There is no division of area between the two and about this there is no dispute. The right of the intervener to operate outside the city of Fremont is not questioned.

The intervener asserts that districts and municipalities have the discretionary right to determine how the service shall be rendered in their authorized areas. No authority for this broad assertion is cited and none has been found. This ignores provisions of statute to the contrary. It ignores the statutorily declared rights of parties contained in section 70-401, R. R. S. 1943, which are by section 70-667, R. R. S. 1943, required to be protected and preserved, as follows: "* * * all provisions of law now applicable to electric light and power corporations, * * * for any of the purposes contemplated in such statutory provisions, the manner or method of construction and physical operation of power plants, systems, transmission lines * * * as herein contemplated, shall be applicable, as nearly as may be, to districts organized under sections 70-601 to 70-672, and in the performance of the duties conferred or imposed upon them under such statutory provisions."

In enacting this statutory provision it must be pre-

sumed that the Legislature had in mind the provisions of section 70-401, R. R. S. 1943, which had been in existence without substantial change since 1923.

As pointed out hereinbefore, in enacting a statute the Legislature must be presumed to have had in mind all previous legislation on the subject. See, Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie, *supra;* Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856; Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119.

From what has been said herein it becomes apparent that the relator was entitled to the service, and it is clear that it was entitled to a writ of mandamus. Mandamus is the proper procedure to compel a public service corporation to furnish service. See Richey v. Omaha & L. Ry. & L. Co., 100 Neb. 847, 161 N. W. 575.

The judgment of the district court is affirmed.

AFFIRMED.

ARLA CATTLE COMPANY, A CORPORATION, ET AL., APPELLANTS, V. REUBEN E. KNIGHT ET AL., APPELLEES.

118 N. W. 2d 1

Filed November 16, 1962. No. 35269.

1. **Appeal and Error.** In the absence of a bill of exceptions it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.
2. **Affidavits: Evidence.** Affidavits used as evidence on the hearing or trial of any issue of fact must have been, as a prerequisite to examination of them in this court, identified and offered in evidence in the trial court and embodied in a bill of exceptions.
3. **Appeal and Error.** This court on appeal will consider only those assignments of error which are argued in the brief of the appellant.
4. **Trial: Judgments.** Section 25-1331, R. R. S. 1943, provides:

"A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

5. ———: ———. In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law.
6. ———: ———. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined.
7. ———: ———. The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial.
8. **Deeds: Mortgages.** The true test in determining whether a conveyance absolute in form should be treated as a mortgage is whether the relation of the parties to each other as debtor and creditor continues. If it does so continue, the transaction will be treated as a mortgage and the conveyance as security only, otherwise not.

Appeal from the district court for Box Butte County: ALBERT W. CRITES, Judge. Affirmed.

Wade H. Ellis, Charles A. Fisher, and Charles F. Fisher, for appellants.

Reddish, Fiebig & Curtiss, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is an action in equity by the Arla Cattle Company, a corporation, and Charles E. Murphy, plaintiffs, against Reuben E. Knight and Florence Knight, husband and wife; F. M. Knight, deceased; the Estate of F. M. Knight, deceased; Edward M. Knight and Ruth Knight, husband and wife; and Edward J. Bignell and Jeannine M. Bignell, husband and wife, defendants. The purpose of the action was for an accounting; that a warranty deed dated April 7, 1933, an affidavit, a warranty deed dated December 3, 1960, and a warranty deed dated

January 2, 1958, be decreed to be satisfied and constitute a mortgage in favor of the defendants and against the plaintiffs; that the amount due, if any, at the date of decree be ordered paid by the plaintiffs to the defendants, after deducting all sums paid by the plaintiffs on leases to the defendants, less sums received by the defendants from sales of parcels of the land involved to others, and all sums received by the defendants from oil and gas leases, the defendants to be credited for all sums paid by them for real estate taxes; that the defendants, and each of them, be required to reconvey the real estate to the plaintiffs; and that the title of the plaintiffs in and to the real estate be quieted against any and all claims by or on behalf of any of the defendants and all persons claiming by, through, and under them.

The defendants Reuben E. Knight, Florence Knight, Edward M. Knight, and Ruth Knight filed a motion for summary judgment, without filing an answer to the plaintiff's petition as amended.

The defendants Edward J. Bignell and Jeannine M. Bignell filed an answer and cross-petition to the plaintiffs' petition, and filed a motion for summary judgment.

The trial court sustained the motion for summary judgment filed by the defendants Reuben E. Knight, Florence Knight, Edward M. Knight, and Ruth Knight; sustained the motion for summary judgment filed by the defendants Edward J. Bignell and Jeannine M. Bignell; and dismissed the plaintiffs' petition as amended, with prejudice.

The plaintiffs filed a motion for new trial which the trial court overruled. The plaintiffs appealed from the order overruling the motion for new trial.

There is no bill of exceptions in this case.

"In the absence of a bill of exceptions it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment."

State ex rel. Line v. Kuhlman, 167 Neb. 674, 94 N. W. 2d 373. See, also, Bryant v. Greene, 163 Neb. 497, 80 N. W. 2d 137.

In Powell v. Van Donselaar, 160 Neb. 21, 68 N. W. 2d 894, the court said: "In Darlington v. State, 153 Neb. 274, 44 N. W. 2d 468, it is said: 'It has long been a mandatory requirement in this jurisdiction * * * that affidavits used as evidence on the hearing or trial of any issue of fact must have been, as a prerequisite to examination of them in this court, identified and offered in evidence in the trial court and embodied in a bill of exceptions.' See, also, State ex rel. Nebraska State Bar Assn. v. Pinkett, 157 Neb. 509, 60 N. W. 2d 641; Higgins v. Loup River Public Power Dist., 157 Neb. 652, 61 N. W. 2d 213."

This court on appeal will consider only those assignments of error which are argued in the brief of the appellant. See Rule 8a 2(4), Revised Rules of the Supreme Court of the State of Nebraska, 1960.

The plaintiffs set forth a number of assignments of error. However, the plaintiffs concede that the court is here asked to decide only one real question, the question of whether there is any genuine issue as to any material fact involved. The only assignment of error discussed, therefore, is whether or not there is any genuine issue as to any material fact involved. We shall consider this as the question to be answered in the instant case.

The plaintiffs contend that the motion for summary judgment of the defendants Reuben E. Knight, Florence Knight, Edward M. Knight, and Ruth Knight, filed before pleading responsively to plaintiffs' petition, was filed prematurely; that the defendants Knight have not filed their answer to the plaintiffs' petition and amended petition; and that the said motion of the defendants Knight is out of order and contrary to law.

Section 25-1331, R. R. S. 1943, provides: "A party against whom a claim, counterclaim, or cross-claim is

asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." See, also, Rule 56(b), Federal Rules of Civil Procedure.

A leading authority on the federal rules states: "* * * the proposition is well settled that a defending party may move for summary judgment prior to the service of a responsive pleading." 6 Moore's Federal Practice (2nd ed.), § 56.08, p. 2049. See, also, cases cited in footnote 7, 6 Moore's Federal Practice (2nd ed.), § 56.08, p. 2047.

The fact that the defendants Knight had not filed a responsive pleading does not make their motion for summary judgment premature, and such motion was timely filed. The plaintiffs' contention in this respect is without merit.

In Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643, the court said: "In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law." See, also, Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290.

In Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244, the court said that the issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined.

"The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial." State v. Kidder, 173 Neb. 130, 112 N. W. 2d 759.

With the foregoing authorities in mind, we now come to the pleadings in this case.

The plaintiffs' petition as amended alleged in substance that this action was brought by the Arla Cattle

Company, a corporation organized and existing under the laws of Nebraska with its principal offices in Alliance, Nebraska, by and through its president, Charles E. Murphy, and by Charles E. Murphy individually; that the plaintiffs have been the owners and at all times have been in possession of certain lands which are described in the petition, comprising 4,542.81 acres of which 1,002.81 acres are in Morrill County and 3,540 acres are in Box Butte County; that on or about April 7, 1933, Charles E. Murphy and Martha E. Murphy, his wife, now deceased, being financially embarrassed, were indebted to and did make and execute to F. M. Knight, a loaner of money, a warranty deed for the stated consideration of $61,037.44, being the principal and interest on a promissory note claimed due from Charles E. Murphy and Martha E. Murphy to F. M. Knight, now deceased, and predecessor and heirs herein to Reuben E. Knight and Edward M. Knight; that said warranty deed was intended to be, and was in truth and in fact, a mortgage from Charles E. Murphy and Martha E. Murphy to F. M. Knight, deceased, for the sum of $61,037.44, was not to be recorded, and was to be returned to Charles E. Murphy and Martha E. Murphy upon their tendering payment of the sum of $61,037.44 to F. M. Knight or his heirs or successors in interest; that as further evidence of such facts and the good faith of Charles E. Murphy and Martha E. Murphy, F. M. Knight made and executed a lease dated April 8, 1933, for 5 years for the aforesaid premises to Charles E. Murphy in a total consideration of $10,000, with payments of $2,000 due on November 1, 1933, and $1,000 due on May 1, 1934, etc.; that on April 8, 1933, there was, in addition to the instruments heretofore referred to, made and executed by Charles E. Murphy and Martha E. Murphy, at the special request of F. M. Knight, an affidavit for and on behalf of F. M. Knight in an effort by F. M. Knight to show that he had purchased the land described herein, when in truth and in fact said warranty deed, the lease, and the

affidavit were all only extensions and renewals of the note and mortgage due from Charles E. Murphy and Martha E. Murphy to F. M. Knight; that since said purported warranty deed, lease, and the affidavit, the plaintiffs, Charles E. Murphy and the Arla Cattle Company, a corporation, have been in continuous possession of the aforesaid real estate under leases executed by F. M. Knight or his heirs and successors in interest herein, Reuben E. Knight or Edward M. Knight, and have paid certain sums as interest and taxes to the defendants, which are set out in the petition; that the defendants, F. M. Knight, Reuben E. Knight, or Edward M. Knight, or some of them, have received unknown sums believed to be in excess of $6,100 from the Superior Oil Company as a bonus and oil rentals for said lands for the years from August 19, 1949, through 1959; that all of said sums received by the defendants from the City of Alliance, Edward J. Bignell, and Jeannine M. Bignell, and for oil and gas lease bonus or rentals, except taxes paid by the defendants, should be applied on the indebtedness, if any, of $61,037.44 due from the plaintiffs to the defendants; that Edward M. Knight and Ruth Knight, his wife, by warranty deed dated January 2, 1958, conveyed all of their right, title, and interest in and to the aforesaid lands to Reuben E. Knight, which warranty deed was filed of record on February 1, 1958, but which warranty deed reserved to Edward M. Knight one-half of all oil, gas, or other minerals, and that said warranty deeds are fraudulent and an attempt by the defendants Reuben E. Knight and Edward M. Knight to show that they are in truth and in fact the owners of said premises and had a right to convey said lands, when they knew or should have known that the plaintiffs, the Arla Cattle Company, Inc., Charles E. Murphy, and Martha E. Murphy, were in possession of and the owners of said real estate and entitled to all oil or delayed rentals of said oil leases; that the plaintiffs, the Arla Cattle Company, Inc., and Charles E. Murphy seek the removal

and reformation of the warranty deed dated April 7, 1933, the affidavit dated April 8, 1933, the warranty deed dated January 2, 1958, from Edward M. Knight and Ruth Knight to Reuben E. Knight, recorded on February 1, 1958, and the warranty deed dated December 3, 1960, from Reuben E. Knight and Florence Knight to Edward J. Bignell and Jeannine M. Bignell, his wife, recorded December 7, 1960; and that the plaintiffs are ready to pay whatever may be justly due to the defendants on said accounting, and offer to pay the same into court or to the defendants.

The deed from Charles E. Murphy and Martha E. Murphy, his wife, is a warranty deed conveying to F. M. Knight the lands in controversy. The deed contained the following recital: "This deed is an absolute conveyance of title in effect as well as in form, and is not intended as a mortgage, trust conveyance or security of any kind. The consideration therefor and for the payment of 1930 and 1931 tax by grantors is full release of all deeds, notes, obligations, costs and charges heretofore subsisting on account of and by the terms of that certain mortgage heretofore existing on the property herein conveyed, executed by Charles E. Murphy and Martha E. Murphy, husband and wife, to F. M. Knight and recorded in Book 48, Page 101, of the Mortgage records of Box Butte County, Nebraska, and in Book 27, Pages 269-270, of the Mortgage records of Morrill County, Nebraska, this conveyance and the payment of said taxes completely satisfying said obligation and terminating said mortgage and the notes or bonds secured thereby and any effect thereof in all respects."

The petition reflects that F. M. Knight is deceased, his death apparently occurring between May 1, 1939, and May 1, 1940, as the schedule of rentals reflects the lease of May 1, 1939, to May 1, 1940, with F. M. Knight as lessor, and the lease of May 1, 1940, to May 1, 1941, with F. M. Knight estate as lessor. The petition further

reflects that leases were executed covering periods from April 8, 1933, to May 1, 1961, with varying amounts of rentals; and that at some unstated date a tract was sold by F. M. Knight, Reuben E. Knight, or Edward M. Knight to the city of Alliance. The petition likewise reflects that F. M. Knight refused to execute a written option for the plaintiffs to repurchase the property as agreed, and from 1940, Charles E. Murphy discussed the settlement of his option to repurchase said real estate with Reuben E. Knight, and on other occasions tendered and offered to pay any sums due and owing.

The defendants Bignell denied all allegations contained in the plaintiffs' petition not expressly admitted, and alleged that they were bona fide purchasers for value of the premises described in their answer without notice of the claim of the plaintiffs, based upon purchase of real estate for valuable consideration; and that they procured and had an abstract of title examined which disclosed the absence of any recording which would provide actual or constructive notice of interest in the Morrill County land of any person other than Reuben E. Knight or Edward M. Knight. The defendants Bignell further alleged that at the time they purchased the said land they were informed of the existence of a lease between Reuben E. Knight as landlord and Charles E. Murphy personally, Charles E. Murphy as president of the Arla Cattle Company, Inc., and Richard D. Murphy as tenants, expiring May 1, 1961; and that there was absence of notice of any claimed interest of plaintiffs in the Morrill County land other than as tenants in possession.

These defendants pleaded the statute of limitations and adverse possession with knowledge by the plaintiffs, instruments appearing of record in Morrill County constituting constructive notice to the plaintiffs as follows: Mortgage, Charles E. Murphy and wife to F. M. Knight, dated June 11, 1928, recorded in the mortgage records, released by F. M. Knight April 7, 1933, and

filed for record in the mortgage records April 21, 1933; deed from Charles E. Murphy and wife to F. M. Knight, dated April 7, 1933, filed April 21, 1933, and recorded; recording of transcript of the will of Frank Millard Knight March 13, 1941, book 13, pages 437 to 440, miscellaneous records, and of certified copy of decree of distribution March 13, 1941, in book 13, pages 441 to 445, miscellaneous records; condemnation proceedings of the United States of America v. 27,819 Acres of land, recognizing title of Reuben E. Knight and Edward M. Knight to subject land, wherein order of court was filed June 17, 1943, and recorded in book 14, page 231, miscellaneous records; condemnation by the United States of America of 1.33 acres of land in Alt survey, Section 44, Township 23 North, Range 47 West, with decree of July 6, 1944, filed July 11, 1944, recorded in book 14, pages 472 and 473, miscellaneous records; and oil and gas lease by Reuben E. Knight and Edward M. Knight and their respective spouses, dated August 19, 1949, filed August 29, 1949, and recorded in book 17, page 223, miscellaneous records, together with the affidavit of Charles E. Murphy and his wife, dated April 8, 1933, recorded April 18, 1960, and the deed from Edward M. Knight and wife to Reuben E. Knight, dated January 2, 1958. These defendants prayed that the plaintiffs' petition be dismissed.

On the proposition raised by the plaintiffs in their petition as amended as to whether or not the deed conveying the property described in the petition to F. M. Knight on April 7, 1933, was an absolute conveyance of such real estate or in effect a mortgage thereon with the right of reconveyance to the plaintiffs upon the payment of the indebtedness heretofore stated to F. M. Knight, we deem the following to be applicable.

In Riley v. Starr, 48 Neb. 243, 67 N. W. 187, the court said: "A safe and perhaps the most satisfactory test, in all such cases, is whether the relation of the parties to each other as debtor and creditor continues. If it

does, the transaction will be treated as a mortgage, otherwise not * * *." Cases are cited. Campbell v. Ohio Nat. Life Ins. Co., 161 Neb. 653, 74 N. W. 2d 546, cites Riley v. Starr, *supra,* and Samuelson v. Mickey, 73 Neb. 852, 103 N. W. 671, on rehearing 73 Neb. 856, 106 N. W. 461, and other cases pronouncing the same rule with approval.

In O'Hanlon v. Barry, 87 Neb. 522, 127 N. W. 860, the court said: "We have repeatedly said that where it is sought to establish by parol that an absolute deed was only intended as a mortgage or given as security, the evidence must be clear, convincing and satisfactory. Deroin v. Jennings, 4 Neb. 97; Schade & Schade v. Bessinger, 3 Neb. 140; Stall v. Jones, 47 Neb. 706; Butler v. Peterson, 79 Neb. 715."

In Cox v. Young, 109 Neb. 472, 191 N. W. 647, quoting from Snoke v Beach, 105 Neb. 127, 179 N. W. 389, the court said: " 'The rule is also established in this state that, where it is sought to vary the effect of a deed absolute on its face by parol testimony so as to declare it to be a mortgage, the evidence must be clear, convincing, and satisfactory before a court is warranted in adjudging it to be a mortgage.' These propositions find support in Sanders v. Ayres, 63 Neb. 271, Kemp v. Small, 32 Neb. 318, and O'Hanlon v. Barry, 87 Neb. 522."

The plaintiffs' petition as amended reflects that there is no evidence whatsoever, let alone clear, convincing, or satisfactory evidence, to support the existence of any right to obtain a reconveyance of the real estate as set forth in the warranty deed given to F. M. Knight. The petition reflects that the debtor-creditor relationship terminated on April 8, 1933, and that the warranty deed or absolute conveyance was not intended as security for a debt.

The pleadings and exhibits appearing in the transcript clearly disclose that the relationship between the plaintiffs and the defendants was that of landlord and tenant.

A period of nearly 28 years elapsed before the plaintiffs

ever made an attempt to set aside the warranty deed here involved and to have it declared to be a mortgage. Considering the pleadings, this action on the part of the plaintiffs clearly indicates a further reason as to why their contention lacks merit.

There are other reasons why the plaintiffs cannot prevail in this case which need not be determined or discussed.

In the state of the record before this court, we conclude that the defendants are entitled to a judgment as a matter of law, and the judgment of the trial court should be affirmed.

AFFIRMED.

ELEONORE HARDING, APPELLEE, V. WENDELL W. HARDING, JR., APPELLANT.
117 N. W. 2d 800

Filed November 16, 1962. No. 35278.

1. **Divorce: Appeal and Error.** An appeal from a judgment denying the modification of a divorce decree is triable de novo in this court subject to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court in determining the weight of the evidence will consider the fact that the trial court heard and observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
2. **Divorce.** An application for the modification of a divorce decree with respect to the custody of minor children, made any time after the granting of the divorce, must be founded upon facts and circumstances which have arisen subsequent to the granting of the divorce.
3. **Parent and Child.** Ordinarily the interests and welfare of a child of tender years will be best served by placing the child in the custody of the natural mother if she is a fit and suitable person.
4. **Parent and Child: Appeal and Error.** In an action involving the custody of minor children, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses,

the conclusion of the trial court as to such reliability will be carefully regarded by this court on review.

Appeal from the separate juvenile court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

Beynon, Hecht & Fahrnbruch, for appellant.

Wagener & Marx, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an appeal from an order of the separate juvenile court of Lancaster County denying a modification of a divorce decree as it relates to the custody and support of the children provided for in the decree.

The petition for divorce was filed by Eleonore Harding, whom we shall hereafter refer to as Nora. The defendant is Wendell W. Harding, Jr., whom we shall hereafter refer to as Del. Two minor children were involved in the litigation. Lucy, 8 years of age at the time of trial, was a daughter of Nora by a former marriage and was legally adopted by Del. Mark, 4 years of age at the time of trial, was the natural son of the parties. The divorce was granted on May 11, 1960, and by its terms the custody of the two children was granted to Nora. Del was required to pay support money for the children in the amount of $95 per month. Alimony was awarded in the amount of $2,500, payable $55 per month until paid. Nora was given the use of the family home until she remarried or abandoned it. At the time of the hearing on the petition to modify the decree Nora was living in the family home and Del had made all payments due under the terms of the decree.

On March 3, 1961, Del filed a petition for modification of the divorce decree praying that he be awarded the custody of the two children. Del alleged that during the time the children were in the custody of Nora they had become dirty and unkempt; that Nora had failed to re-

main in the home and care for the children although she had the means to do so; that she had left the home for periods of time without making adequate provision for the children during her absence; that Nora was guilty of indiscretions in the home that resulted in a bad environment; and that Nora failed to properly supervise and train the children. Del alleged that he had remarried; that he has a good home for the children; and that their best interests require that he have their custody. The allegations of fact in the petition for modification that tend to support it are denied generally by Nora. The trial court refused to modify the decree of divorce by changing the custody of the children and denied, also, the prayer of the cross-petition praying for an additional allowance for their support.

There is evidence in the record that the children were at times dirty and unkempt. There is evidence to the contrary to the effect that the children were generally clean and well cared for. There is some evidence that the children were not well supervised, particularly after the children returned from school or nursery, and before Nora returned home from work. There is evidence that the children on occasion left the home premises without their mother's knowledge and went to the home of their great-grandmother for whom they appear to have great affection. There is evidence that the children, particularly Mark, were difficult to handle on occasion, and that sometimes they got involved in difficulties not uncommon to children of tender years.

It is evident from the record that neither Nora nor Del lost any time in seeking the company of the opposite sex after the divorce was granted. This question is pertinent as to whether or not Nora is a fit and suitable person to retain the custody of the children and whether or not Del is a fit and suitable person to have such custody if Nora is found to be an unfit and unsuitable person to have their custody.

In this respect there is some evidence that Nora dated

a married man; that a single man remained overnight in her home on one occasion; and that she made occasional trips out of town with men friends. She denied any wrongdoing and explained the situations that tend to impugn her character. On the other hand, the evidence shows that Del was dating other women, particularly the one to whom he is presently married. Each of the parties is very critical of the other's conduct. The evidence reflects somewhat upon the character of each. We concur with the holding of the trial court that the evidence is insufficient to sustain a finding that either is an unfit or unsuitable person to have the custody of these children.

The evidence shows that both parents have great affection for these two children. The children appear to have a normal affection for each of their parents. The evidence is in conflict on the acts charged as misconduct by each against the other. We cannot overlook the fact that the trial court saw and heard the witnesses testify, while we have only the written record from which we can make our determination. On questions of fact that are in irreconcilable conflict the findings of the trial court furnish the only reasonable guide for us to follow. In proceedings to modify a decree of divorce we are required to try the case de novo on the record. Where the evidence is principally oral and in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review. Dwinnell v. Dwinnell, 165 Neb. 566, 86 N. W. 2d 579.

The children, Lucy and Mark, were 8 and 4 years of age at the time of trial. Lucy is the daughter of Nora by a former marriage who was formally adopted by Del. They are children of tender years whose interests are ordinarily best served by placing them in the custody of the natural mother, if she be a suitable and fit person. Ivins v. Ivins, 171 Neb. 838, 108 N. W. 2d 99.

The custody of children of tender years having been awarded to the natural mother, such custody will not ordinarily be disturbed unless it be shown that the mother is unfit to have their custody, or that their best interests require such action. Wakefield v. Wakefield, 157 Neb. 611, 61 N. W. 2d 208.

After a consideration of all the evidence, and the allowable effect of the trial court's findings on the facts that are in irreconcilable conflict, we conclude that the evidence does not sustain a finding that Nora was an unfit and unsuitable person to have the custody of the two children. We find no basis, also, for increasing the amount of child support fixed by the original decree of divorce. The trial court having come to these same conclusions, we affirm the judgment of the trial court. We allow appellee's counsel $250 for services rendered in this court, to be taxed as costs.

AFFIRMED.

MERLIN OLSON, INDIVIDUALLY AND AS ASSIGNEE, APPELLEE, V. UNION FIRE INSURANCE COMPANY, ALSO KNOWN AS UNION INSURANCE COMPANY MUTUAL, APPELLANT.
118 N. W. 2d 318

Filed November 30, 1962. No. 35195.

1. **Insurance.** The liability of an insurer to pay in excess of the limits of the insurance policy accrues when the insurer, having the exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within policy limits.
2. ———. When an insurer has the exclusive right to settle a claim within the limits of its liability, it has an option to compromise but no contractual obligation to do so.
3. ———. The amount of liability fixed by an insurance policy and upon which the premium is paid determines the limit of the contractual liability and duty of the insurer.
4. ———. An insurer may settle a claim within the limit of its liability as it chooses since the insured cannot be prejudiced by a settlement to be paid by the insurer.

5. ———. An insurance company is not required to waive its defense of nonliability which is made in good faith to avoid being held for a judgment in excess of the limits of its insurance policy.
6. ———. An insurance company cannot be held for the payment of a liability in excess of policy limits merely because its determination, arrived at in good faith, proved to be erroneous in the light of subsequent events.
7. ———. The right of an insurer to control the litigation in all of its aspects carries with it the duty to exercise diligence, intelligence, good faith, and conscientious fidelity in the interests of the parties.
8. ———. Where an insurer has exercised good faith in declining a settlement which has been fully and fairly considered, based on an honest belief that insurer could defeat the action or keep any possible judgment within policy limits, and its conclusions are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, accompanied by legal advice with reference thereto, no liability over policy limits exists even if it is ultimately determined that its determination was a mistaken one.

Appeal from the district court for Dixon County: JOHN E. NEWTON, Judge. Reversed and remanded with directions.

Lyle C. Holland and Healey & Healey, for appellant.

Harry N. Larson, Wear, Boland, Mullin & Walsh, and A. Lee Bloomingdale, Jr., for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an action by plaintiff, individually and as assignee of Thomas Shellington, against the defendant insurance company because of the refusal of the latter to settle the claims of plaintiff against Thomas Shellington within the limits of an automobile insurance policy issued by the insurance company to E. C. Shellington, Thomas Shellington being an additional insured under the provisions of the insurance policy.

The automobile accident giving rise to the present

litigation occurred on June 29, 1952. At about 11:30 p.m. of that day Thomas Shellington, then 17 years of age, was driving his father's automobile from Wayne to Wakefield, in Wayne County, Nebraska, accompanied by four other members of the Wakefield Junior American Legion baseball team. Merlin Olson was one of the four guests riding in the Shellington automobile. At a point 2 miles south and 2 miles west of Wakefield an accident occurred on a bridge which had been constructed on an angle with the highway. There was a curve in the highway immediately west of the bridge. The road was level for 50 rods west of the bridge. The bridge was difficult to see until one approached close to it. The railings on the bridge were unpainted, badly rusted, and dark in color. There was nothing to warn an approaching traveler from the west of the position of the bridge with reference to the road. It was a dark night. The automobile approached the bridge at a speed of 45 to 50 miles an hour on the right side of the road with its headlights on the bright beam. The driver did not see the bridge until he was about 25 feet from it. The automobile struck the bridge railing and went off the bridge. Merlin Olson sustained injuries resulting in total and permanent disability. A more detailed statement of the facts can be found in Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20.

Merlin Olson, by his mother and next friend, brought suit against the County of Wayne to recover damages for his injuries as a result of the alleged insufficiency and disrepair of the highway and bridge at the place of the accident. The trial court directed a verdict for the defendant at the conclusion of the evidence, and this court affirmed. Olson v. County of Wayne, 157 Neb. 213, 59 N. W. 2d 400. Plaintiff then commenced an action against Thomas Shellington to recover for injuries sustained while riding as a guest in the automobile driven by Shellington. Whether or not Shellington was guilty of gross negligence was the primary issue in that

case. The jury found for the plaintiff in the amount of $24,000 and added these words in its verdict: "We find slight negligence on the part of the defendant." The trial court set aside the inconsistent verdict and ordered a new trial. This court affirmed. Olson v. Shellington, 162 Neb. 325, 75 N. W. 2d 709.

Upon a second trial of the case in the district court the jury found the driver of the automobile guilty of gross negligence and returned a verdict for the plaintiff for $50,000. This court on appeal held that the evidence was sufficient to take the case to the jury on the issue of gross negligence and affirmed the judgment. Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20. The insurance company thereupon paid $10,000 with interest and costs, such amount being its limit of liability under the provisions of the insurance policy.

The plaintiff thereafter commenced this action against the insurance company, alleging the issuance of the insurance policy to E. C. Shellington, that Thomas Shellington was an additional insured, the limit of liability as to any one person of $10,000, the offers to settle plaintiff's claims for $10,000, and the demands of Thomas Shellington that the offers of settlement be accepted; asserting negligence and bad faith by the insurance company in refusing to settle the claims for $10,000; and praying for judgment for $50,000. The insurance company denied liability and specifically denied that it was guilty of any negligence, or that it acted in bad faith in any manner in its handling of the litigation. For reply the plaintiff specifically denied that defendant was no longer obligated to pay any further amount by virtue of the issuance of the policy of insurance and otherwise generally denied the affirmative allegations of the answer. Upon the trial of the case the jury returned a verdict for plaintiff against the insurance company for $40,000. The insurance company has appealed. The insurance company assigns as error the failure of the trial court to sustain its motions for a directed verdict.

The liability of an insurer to pay in excess of the face of the policy accrues when the insurer, having exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within the policy limit. The weight of authority is to the effect that when the insurer has the exclusive right to settle a claim within the limits of its liability, it has an option to compromise but no obligation to do so. In the event the insurer elects to resist a claim of liability, or to effect a settlement thereof on such terms as it can get, there arises an implied agreement that it will exercise due care and good faith where the rights of an insured are concerned.

The amount of liability fixed by the insurance policy, upon which the premium is paid, determines the limit of the contractual liability and duty of the insurer. An insurer may settle a claim within its limit of liability as it chooses since the insured cannot be injured by a settlement to be wholly paid by the insurer. The exclusive power to settle a claim within the limits of its liability is therefore ceded to the insurer for its sole benefit. While an insured may compromise his possible liability over and above the limits of the insurance policy, he has no duty even to attempt to do so. He may rely upon the policy, the promise to indemnify in a fixed amount, and the duty of the insurer to defend and to use its discretionary authority to settle in good faith. It is clear that the insurance company is not liable to plaintiff for refusal to settle his claim unless the refusal was in bad faith. The question raised by this appeal is whether or not the evidence is sufficient to present a question for the jury as to the bad faith of the insurance company.

"Good or bad faith is a state of mind. Of necessity, it must be determined from proof of conduct, except as the owner of the mind discloses its operations. Defendants, being corporations, could act only through agents, whose state of mind is that of the defendants."

City of Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N. W. 643.

With these fundamental rules in mind we shall set forth the evidence upon which the verdict was returned. The testimony of plaintiff is to the effect that the serious injury sustained by Merlin Olson and the course of the litigation between plaintiff, the County of Wayne, and Thomas Shellington indicated that a judgment in excess of the limits of the insurance policy would be obtained and that it was negligence or bad faith on the part of the insurance company to refuse to settle the claim within the limits of the policy upon demand by Thomas Shellington that it do so. The evidence of the insurance company is that it honestly believed that gross negligence on the part of Thomas Shellington, the driver of the automobile involved in the accident, could not be established; in other words, that it was a nonliability claim. The evidence shows that the insurance company took statements from all persons having any knowledge concerning the accident. Its attorneys advised that gross negligence on the part of Thomas Shellington did not exist. The manager of the claim department, a lawyer, was of the opinion that gross negligence did not exist. The insurance company employed Guy C. Chambers, an able lawyer of long experience in personal injury cases involving gross and slight negligence, for an opinion as to whether or not Thomas Shellington could be held for gross negligence. His opinion was, after a study of the evidence in the Wayne County case, the statements and depositions taken, and a consideration of the Nebraska Supreme Court decisions, that gross negligence did not exist as a matter of law. After it was determined by the rulings of the district court that the evidence of gross negligence was sufficient to submit the case to a jury, the agents and legal counsel of the insurance company determined that the case could be successfully defended before an impartial jury. The question here is not whether its judgment was correct in

analyzing the facts and the law of the case, but whether it acted honestly, without negligence, and in good faith.

We think the evidence shows conclusively that it used all available means to assemble the facts and to determine the applicable law. Whether or not the evidence was sufficient to sustain a finding of gross negligence was a close question as shown by the meticulous care with which the facts were considered by this court in Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20. "Courts, as well as attorneys, sometimes differ on the law applicable to a given state of facts." Berk v. Milwaukee Automobile Ins. Co., 245 Wis. 597, 15 N. W. 2d 834. We find none of the elements of negligence or bad faith existed in the making of these determinations. The conclusion of the insurance company that it had a valid defense, although wrong, is not in itself evidence of negligence or bad faith. Byrnes v. Phoenix Assurance Co., 303 F. 2d 649.

While it is true that the insurance company knew of the seriousness of the injuries sustained by Olson in the accident and would sustain a judgment for as much as $100,000, it was not bound to surrender its defense of nonliability to avoid being held for a judgment in excess of the limits of its policy. It cannot be held merely because its determination, honestly arrived at, proved to be erroneous in the light of subsequent events. The contention of the plaintiff is, in effect, that the insurance company, primarily in the light of previous litigation, should have foreseen a judgment against Thomas Shellington in excess of its policy limits and that its mistake in this respect amounts to negligence or bad faith. We think not.

In the instant case Thomas Shellington has at all times denied that he was guilty of any negligence. His demand that the insurance company settle the claim is not based, therefore, on any admitted liability on his part but on the theory that the insurance company should pay $10,000, which it claimed it did not owe, in

order to relieve Shellington of the litigation and the incidents thereof. It is not negligence or bad faith on the part of an insurer to refuse a settlement which it honestly believes is not to its best interest merely to avoid the distasteful incidents of litigation on the part of its insured.

"Exclusive authority to act does not necessarily mean the right to act arbitrarily. * * * The right to control the litigation in all of its aspects carries with it the correlative duty to exercise diligence, intelligence, good faith, honest and conscientious fidelity to the common interest of the parties." Traders & General Ins. Co. v. Rudco Oil & Gas Co., 129 F. 2d 621, 142 A. L. R. 799.

"* * * a defense going far enough to show reasonable and probable cause for making it will vindicate the good faith of the insurance company." Hall v. Preferred Acc. Ins. Co., 204 F. 2d 844, 40 A. L. R. 2d 162.

"* * * it cannot be said to be bad faith to deny a claim when there is substantial evidence to support the denial." Kleinschmit v. Farmers Mut. Hail Ins. Assn., 101 F. 2d 987.

The general rules as to the liability of the insurer are stated in Davy v. Public National Ins. Co., 181 Cal. App. 2d 387, in the following apt language: "Good faith implies honesty, fair dealing and full revelation. * * * Bad faith implies dishonesty, fraud and concealment. * * * Neither mistaken judgment nor unreasonable judgment is the equivalent of bad faith. * * * As a consequence, liability upon the part of the insurer for refusal to accept an offer of settlement may not be predicated upon its failure to correctly predict the outcome of the action it is defending." As one court aptly stated: "The gift of prophecy has never been bestowed on ordinary mortals, * * *." Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 S. W. 2d 777.

There is a lack of uniformity in the cases in dealing with this subject. See, Annotations, 40 A. L. R. 2d 168, 68 A. L. R. 2d 892. We shall not undertake a discussion

of the refinements of these cases. We think the controlling rule in the instant case is: If the insurer has exercised good faith in all of its dealings under its policy, if the settlement which it has rejected has been fully and fairly considered and has been based on an honest belief that the insurer could defeat the action or keep the judgment within the limits of the policy, and if its determination is based on a fair review of the evidence after reasonable diligence in ascertaining the facts, accompanied by competent legal advice, a court will not subject the insurer to liability in excess of policy limits if it ultimately turns out that its determination is a mistaken one. See Christian v. Preferred Acc. Ins. Co., 89 F. Supp. 888.

Where an insurer acts honestly and in good faith upon adequate information, it will not be held liable because it failed to correctly prophecy the result. The evidence of the plaintiff fails to make even a prima facie case of bad faith. The evidence of the insurance company which stands undisputed shows the good faith of the company in refusing to settle within the limits of the insurance policy. The trial court erred, therefore, in not sustaining the motion of the insurance company for a directed verdict at the close of all the evidence. The judgment of the district court is reversed and the cause remanded with directions to sustain defendant's motion for judgment notwithstanding the verdict and to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

BROWER, J., dissenting.

I respectfully dissent from the decision of the court. My disagreement with the court is in the application of the law to the facts in this particular case. The case against Wayne County was brought July 23, 1952. The decision of this court in Olson v. County of Wayne, 157 Neb. 213, 59 N. W. 2d 400, was decided June 19, 1953. To my mind this court in that case decided that condition of the road or bridge was not the proximate

cause of the plaintiff's injury and rather pointedly suggested that the negligence of the driver was the proximate cause. On April 2, 1954, Merlin Olson, by his next friend, started his action against Thomas Shellington, the insured's son. At the suggestion of defendant's counsel made by letter to the company, it sought the opinion of Mr. Guy Chambers, an eminent lawyer, particularly qualified in personal injury actions, as to the liability of the defendant about the middle of September 1954. The portion of the letter of the defendant's counsel suggesting the reference made after consulting the defendant Thomas Shellington is in these words: "Considering that Tom Shellington is a minor, and not a very bright minor at that, it is doubtful if he understands why he is not liable to the injuries to Merlin Olson or to any other passengers in the automobile which he was driving. We would therefore like to visit with you about the possibility of securing an opinion from a recognized authority on negligence law to the effect that Tom Shellington is not liable for any injuries to the guests in the car, and that we are therefore not being unreasonable in refusing to settle this case within the limits of the policy. It would seem that such an opinion would be of much more value to show our good faith in the handling of this claim than any statement from young Shellington to the effect that he doesn't believe he is liable for the injuries to Merlin Olson. When Mr. Head returns from his vacation, we would like to take that matter up with him."

This portion of the letter to my mind is susceptible of different meanings. One might be that the company was not attempting to negotiate any settlement and intended in all events to stand pat and sought the advice of counsel wholly as a defense to a suit of the present nature well knowing the minor defendant was not very bright and not convinced of his not being liable for the plaintiff's injuries; further, that counsel writing the letter anticipated an adverse judgment in the case as early

as 1954. Mr. Chambers, after studying the files of the defendant herein with respect to the accident and the evidence in the case against the County of Wayne, gave his opinion that Shellington was not guilty of gross negligence and the plaintiff guest could not recover. Neither Mr. Chambers nor anyone else was ever consulted again in spite of the fact that subsequent events in my opinion increasingly pointed to the ultimate liability of the defendant Shellington. This is a case for injuries that the defendant's vice president handling claims, himself a lawyer, conceded would substantiate a verdict of at least $100,000, if liability was established. On March 18, 1955, the jury returned the verdict for $24,000 after the trial court by its instructions had submitted the issue of Shellington's gross negligence to the jury. The verdict was set aside because of the special finding or notation on the verdict that defendant was guilty of "slight negligence." On appeal to this court the defendant contended the case should have been dismissed on his motion for judgment notwithstanding the verdict because there was no evidence of gross negligence. This court sustained the trial court in granting a new trial but refused to dismiss the case. Its opinion, Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20, indicates clearly that an issue of gross negligence sufficient to submit to the jury was shown in the first trial. Defendant argues that another jury might well have held that the negligence was only slight. This is true of course but it might on the other hand indicate a jury would on a subsequent trial find for the plaintiff on the issue of gross negligence and under circumstances not rendering their verdict assailable. That the defendant itself realized the situation was grave is to my mind shown to a considerable extent by its raising the reserve for this risk from time to time. On the report of the accident it was $1,500. Later it was raised to $4,000. On June 23, 1953, after the Supreme Court's opinion in Olson v. County of Wayne, *supra,* it was

raised to $9,000. In December 1958, it was raised to $10,000, the full limits of the policy, though all other liability appeared to be barred by limitations except this one cause. During practically the whole of the period this suit was pending in district court up to and after the time of the trial court's overruling the defendant's motion to dismiss at the second trial of the case, it could have been settled for the $10,000, the limit of defendant's insurance. The insured at all times demanded the settlement. The matter of negotiation and settlement was, as provided by the policy, in the exclusive hands of the defendant insurance company herein. It neither accepted the offer for settlement of the claim for the full amount of its policy limits nor explored the possibility of a lesser settlement by counter negotiation. Its negotiation consisted of one word "no," except on one occasion on which it refused to answer at all and didn't inform its insured that an offer was made at that time. After the last judgment for $50,000 and before the appeal therefrom by Shellington to this court, the company which had reassured the defendant for all loss over $5,000, plus half of the cost, suggested there might still be a settlement affected and advised it should be attempted. The reinsurer pointed out in its letter that more than a year and a half before the expense of litigation had then exceeded $4,300, and that the ensuing expense had no doubt considerably augmented that amount. The defendant's vice president made no attempt to settle until after the judgment of $50,000 was pending on appeal to this court and then according to him because of the suggestion of the coinsurer only. Defendant's vice president to my mind in his testimony considered the continuation of the litigation to be a matter of principle and gave little thought to the rights of the assured, the extent of the damage, nor the amount of the expense.

There is to my mind clearly sufficient evidence of

bad faith on the part of the defendant to authorize the issue to be submitted to the jury.

I am authorized to state Judge Spencer concurs in this dissent.

STATE OF NEBRASKA, APPELLEE, V. MARY BROWN, APPELLEE, IMPLEADED WITH NORMA LEVERING ET AL., APPELLANTS.
118 N. W. 2d 328

Filed November 30, 1962. No. 35220.

1. **Criminal Law.** In a criminal action the Supreme Court will not interfere with a verdict of guilty based on conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. ———. Under section 29-2002, R. S. Supp., 1961, a motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of an abuse of discretion.
3. **Criminal Law: Evidence.** A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered.
4. ———: ———. Prior inconsistent and contradictory statements of a defendant which were voluntary are admissible for the purpose of impeachment.
5. **Witnesses: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown.
6. **Juries.** The fact that a jury may have deliberated for a relatively short time before reaching its verdict does not establish that it acted with passion and prejudice or ignored the instructions of the court.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

William W. Graham, for appellants.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee State of Nebraska.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

The defendants, Norma Levering and Victoria Levering, were convicted of robbery under section 28-414, R. R. S. 1943. Their motion for new trial was overruled and they have appealed to this court. Their assignments of error are that the evidence is not sufficient to sustain their conviction; that the trial court erred in refusing to grant them separate trials, in failing to strike certain evidence, and in restricting their right to cross-examine; and that the jury ignored the instructions of the court.

There is evidence from which the jury could have found that Norman L. Runyon, the complaining witness, met the defendants at Morgan's Bar in Omaha, Nebraska, on the evening of March 24, 1961. When Morgan's Bar closed at 1 a. m., Runyon and the defendants went to 1407 Cass Street where they met Mary Brown. About 30 minutes later, as Runyon was leaving 1407 Cass Street, the defendants and Mary Brown "jumped" him when he was outside the door; that they grabbed him and started whipping his clothes off; that he had about $60 in bills in his right-hand pocket and about $400 in a billfold in his back pocket; that Mary Brown took the billfold out of his back pocket; and that Norma Levering had her hand in his other pocket while Victoria Levering was hitting him. In addition to being beaten with fists, Runyon was struck with a sharp object. When the fight was over, everything, including his car keys, had been removed from Runyon's pockets. Runyon then walked to the police station and reported the robbery. From there he was taken to a hospital and treated for bruises and lacerations about the face and head.

Although there was evidence to the contrary, the evidence was sufficient for the jury to find that Runyon was robbed by the defendants and Mary Brown as charged in the information. It is not the province of

this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Wilson, *ante* p. 86, 115 N. W. 2d 794.

The defendants and Mary Brown were charged with robbery in one information. Several days before the trial the defendants filed a motion for separate trials supported by an affidavit of their attorney. The motion and affidavit appear in the transcript but the bill of exceptions does not contain any evidence which was before the trial court at the time of the ruling on the motion. Affidavits in support of a motion will not be considered by this court where they are not preserved in the bill of exceptions. Mulder v. State, 152 Neb. 795, 42 N. W. 2d 858.

Before 1957, persons who were charged jointly with the commission of a felony were entitled to separate trials as a matter of right if a timely application was made to the court for that purpose. § 29-2002, R. R. S. 1943; Reed v. State, 93 Neb. 163, 139 N. W. 1015. In 1957 the statute was amended and section 29-2002, R. S. Supp., 1961, now provides in part: "Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. * * * If is (it) appears that a defendant or the state would be prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires."

The right to a separate trial now depends upon a showing that prejudice will result from a joint trial. A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence

of a showing of an abuse of discretion. Opper v. United States, 348 U. S. 84, 75 S. Ct. 158, 99 L. Ed. 101, 45 A. L. R. 2d 1308; 53 Am. Jur., Trial, § 56, p. 65; 23 C. J. S., Criminal Law, § 933, p. 696.

The fact that one of several defendants had made an admission which may be received in evidence against him is not a conclusive ground for ordering the defendants tried separately even though the admission incriminates the other defendants. United States v. Caron, 266 F. 2d 49; Costello v. United States, 255 F. 2d 389. There is some danger of prejudice in any trial involving multiple defendants but severance should be denied in the absence of a showing of prejudice against which the trial court will not be able to afford protection. United States v. Lev, 22 F. R. D. 490, 276 F. 2d 605. The record in this case does not establish that the trial court abused its discretion in overruling the motion of the defendants for separate trials.

When Mary Brown was searched at the police station she was found to have $222 on her person. A police matron and a detective testified that Mary Brown said that this money had been given to her by the defendants. No objection or motion to strike was made to this testimony. The defendants now contend that the trial court on its own motion should have stricken this testimony as hearsay and instructed the jury to disregard it as to the defendants.

A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered. Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357. A defendant may not permit questionable or incompetent evidence to be admitted without objection, take the chance of a favorable verdict, and thereafter complain of its admission. Vinciquerra v. State, 127 Neb. 541, 256 N. W. 78. The failure to object at the time the evidence was offered prevents the defendants from asserting at this time that the trial court erred in failing to exclude this testimony as to the defendants.

Both defendants testified in their own behalf. On cross-examination each defendant was questioned in regard to statements made on the day of their arrest to the county attorney at the police station in the presence of a court reporter. On rebuttal the State produced the court reporter who testified as to the statements made by the defendants. The statements made by the defendants which were proved by the State on rebuttal were not in the nature of confessions and did not directly implicate the defendants in the crime. The statements contradicted the testimony of the defendants at the trial and were admissible for the purpose of impeachment. Tatum v. State, 61 Neb. 229, 85 N. W. 40; Drewes v. State, 156 Neb. 319, 56 N. W. 2d 113.

The defendants argue that their motion to strike the testimony as to the statements made at the police station should have been sustained because it was not shown that the statements were voluntary. The argument is based upon testimony by the defendants on redirect examination that they told the county attorney that they did not want to answer any questions.

The court reporter testified that no threats or promises of leniency were made to either defendant and that each defendant was advised by the county attorney that she could consult counsel and refuse to answer any of the questions. The trial court instructed the jury that the statements could be considered only for the purpose of determining the weight of the testimony and the credibility of the witness and only if the jury found that the statements were made voluntarily and not obtained by compulsion or fear nor by any promise or inducements offered to the witness. The assignment of error is without merit.

The defendants complain that the trial court erroneously restricted their right to cross-examine the witnesses for the State. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of

discretion is shown. Pierce v. State, 173 Neb. 319, 113 N. W. 2d 333.

Many of the questions to which objections were sustained related to matters which were not relevant or material to the case. Some of the questions related to the disposition of other persons arrested at the same time. Other questions were argumentative or did not properly reflect the evidence. The record does not show an abuse of discretion by the trial court in limiting the scope of cross-examination.

The case was submitted to the jury at 4:11 p. m. At 5:25 p. m., the jury returned its verdict. The defendants argue that this establishes that the jury acted with passion and prejudice, and ignored the instructions of the court.

There is no rule which requires the jury to deliberate any particular length of time. In State v. John, 11 Wis. 2d 1, 103 N. W. 2d 304, the Supreme Court of Wisconsin affirmed a conviction for murder where the jury deliberated 67 minutes after a trial which lasted for 7 days. The court noted that the jury might have considered the evidence which it believed to be so convincing that it could reach a verdict in a comparatively short time. See, also, State v. Payne (Mo.), 342 S. W. 2d 950; Sepulveda v. People (Colo.), 361 P. 2d 625; 23A C. J. S., Criminal Law, § 1368, p. 976.

The record in this case does not establish that the jury acted with passion and prejudice or ignored the instructions of the court.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARY BROWN, APPELLANT.
118 N. W. 2d 332

Filed November 30, 1962. No. 35224.

1. **Criminal Law: Trial.** The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn from a consideration of the actions of the defendant viewed in the light of all surrounding circumstances.
2. ———: ———. Intent may be inferred from the nature of the act itself and the circumstances surrounding it.
3. ———: ———. Instructions must be considered as a whole in determining whether a particular instruction or a part thereof is prejudicial.
4. **Criminal Law: Evidence.** The clothing which a complaining witness was wearing at the time the crime was committed may be received in evidence if it has evidentiary value.
5. **Criminal Law: Trial.** It is the better practice for a trial court to give a cautionary instruction on the testimony of an accomplice, but a failure to do so is not reversible error unless such an instruction was requested.
6. **Criminal Law.** A sentence which is within the limits authorized by statute will not be reversed in the absence of an abuse of discretion.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Thomas P. Lott, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

The defendant, Mary Brown, was convicted of robbery under section 28-414, R. R. S. 1943. Her motion for new trial was overruled and she has appealed to this court.

This case is a companion case to No. 35220, *ante* p. 387, 118 N. W. 2d 328. The defendant was charged jointly

with Norma Levering and Victoria Levering. There was a joint trial in the district court. Victoria Levering and Norma Levering filed a separate notice of appeal which was docketed in this court as No. 35220. Since the appeals have been briefed and argued separately, they will be disposed of by separate opinions.

The assignments of error which require consideration are that the evidence is not sufficient to sustain the conviction; that the trial court erred in admitting certain evidence and in giving and failing to give certain instructions; and that the sentence is excessive.

There was evidence from which the jury could have found that Norman L. Runyon, the complaining witness, together with Norma Levering and Victoria Levering, met the defendant at 1407 Cass Street in Omaha, Nebraska, shortly after 1 a.m., on March 25, 1961; that about 30 minutes later, as Runyon was leaving 1407 Cass Street, the defendant with Norma Levering and Victoria Levering "jumped" him when he was outside the door; that they grabbed him and started whipping his clothes off; that he had about $60 in bills in his right-hand pocket and about $400 in a billfold in his back pocket; that the defendant took the billfold out of his back pocket; and that Norma Levering had her hand in his other pocket while Victoria Levering was hitting him. In addition to being beaten with fists, Runyon was struck with a sharp object. When the fight was over, everything, including his car keys, had been removed from Runyon's pockets. Runyon then walked to the police station and reported the robbery. From there he was taken to a hospital and treated for bruises and lacerations about the face and head.

The defendant argues that the evidence was insufficient in that there was no evidence of an "intent to rob or steal" on the part of the defendant as required by the statute, section 28-414, R. R. S. 1943. The law does not require independent evidence of the specific intent required. Krchnavy v. State, 43 Neb. 337, 61

N. W. 628. The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant viewed in the light of all surrounding circumstances. Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357. Intent may be inferred from the nature of the act itself and the circumstances surrounding it. Young v. State, 127 Neb. 719, 256 N. W. 908. The evidence in this case was sufficient for the jury to find that the defendant took the money from the person of Runyon with intent to rob or steal.

There was evidence that the defendant had been drinking before the robbery occurred. That was a circumstance which the jury could consider in determining whether the defendant had the specific intent required by the statute. The trial court properly instructed the jury that evidence of excessive intoxication by which a party is wholly deprived of reason may be considered for the purpose of determining whether such party is capable of entertaining the specific intent charged. Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761.

The trial court also instructed the jury as to aiders and abettors. The defendant complains that this was error in that the jury might have found the defendant guilty as an aider and abettor without finding that she had the specific intent required by the statute. Other instructions given by the trial court covered the matter of the specific intent required by the statute. The instructions when considered as a whole are not subject to the criticism made by the defendant. Instructions must be considered as a whole in determining whether a particular instruction or a part thereof is prejudicial. Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588.

The State offered in evidence the clothing which Runyon was wearing at the time the robbery occurred. If the clothing which the complaining witness was wearing at the time the crime was committed has evidentiary

value it may be received in evidence. Miller v. State, 169 Neb. 737, 100 N. W. 2d 876; MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45. In this case the clothing was of evidentiary value in that it tended to prove the force and violence with which the robbery was committed. The exhibits were properly identified and received in evidence.

The defendant complains that the trial court should have given a cautionary instruction in reference to the testimony of accomplices. The defendant did not request that such an instruction be given. The general rule is that the trial court is not required to give a cautionary instruction in the absence of a request. Miller v. State, 173 Neb. 268, 113 N. W. 2d 118. It is the better practice for a trial court to give a cautionary instruction on the testimony of an accomplice, but a failure to do so is not reversible error unless such an instruction was requested. Cornell v. State, 138 Neb. 708, 294 N. W. 851.

The State did not rely upon the testimony of an accomplice in this case but several witnesses testified, without objection, to statements that Victoria Levering, Norma Levering, and the defendant made after the robbery had occurred. The trial court instructed the jury that it should consider the guilt or innocence of each defendant separately, and that evidence relating to one defendant alone could not be considered against the other defendants.

The defendant complains that her sentence to 4 years imprisonment in the Nebraska Reformatory for Women is excessive. The statute provides a penalty of not less than 3 years and not more than 50 years imprisonment in the penitentiary. § 28-414, R. R. S. 1943. The sentence which was imposed is very near the minimum sentence prescribed by the statute. Any evidence that was presented to the trial court at the time of sentencing was not preserved in the bill of exceptions. Where the sentence imposed is within the limits authorized by statute, the sentence will not be disturbed in the absence of an

abuse of discretion. Olney v. State, 169 Neb. 717, 100 N. W. 2d 838. The record in this case does not establish that the sentence imposed by the trial court was an abuse of discretion.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

KEITH S. SCHWARTZ AND KENNETH P. SCHWARTZ, EXECUTORS OF THE ESTATE OF JOSEPH SCHWARTZ, DECEASED, APPELLANTS, V. B. R. HIBDON, FIRST AND REAL NAME UNKNOWN, DOING BUSINESS AS OIL FIELD DOZER SERVICE, ET AL., APPELLEES.

118 N. W. 2d 327

Filed November 30, 1962. No. 35266.

SUPPLEMENTAL OPINION

Appeal from the district court for Cheyenne County: JOHN H. KUNS, Judge. On motion for rehearing. See *ante* p. 129, 116 N. W. 2d 187, for original opinion. Original opinion clarified. Motion for rehearing overruled.

Heaton & Heaton and Leon A. Sprague, for appellants.

Halcomb, O'Brien & Everson and Harry R. Meister, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The opinion contains the following language: "We believe the question is not so much whether there was a submissible issue for a jury as whether Thompson was negligent as a matter of law." "He had a clear duty to exercise due care in attempting to pass the deceased. We do not believe he did. It is also evident he did not have his truck under reasonable control when

he attempted to pass." "It may well be that when Thompson became aware of the car behind him, he was in an emergency situation from which he could not extricate himself. Yet the situation was one of his own making. It was brought on by his own actions and omissions."

As a matter of clarification, the foregoing conclusions were not intended to control the rulings of the trial court or the manner of its submission to the jury if it be determined that a jury question is presented.

With this clarification of our opinion, the motion for rehearing is overruled.

ORIGINAL OPINION CLARIFIED.
MOTION FOR REHEARING OVERRULED.

IN RE ESTATE OF ALFRED ANDERSON, DECEASED. MYRTH ANDERSON ET AL., APPELLANTS AND CROSS-APPELLEES, V. WILLIAM H. LAMME, ADMINISTRATOR OF THE ESTATE OF ALFRED ANDERSON, DECEASED, APPELLEE AND CROSS-APPELLANT.

118 N. W. 2d 339

Filed November 30, 1962. No. 35267.

1. **Executors and Administrators.** An administrator who pays out money in pursuance of an order made by the county court cannot be personally charged with the reimbursement of the same in the absence of evidence showing that the order was obtained by fraud and that he had guilty knowledge of the same.
2. **Attorney and Client.** An attorney at law has a general or retaining lien for the balance of compensation due him upon money in his hands belonging to his client. The lien extends to the whole indebtedness covering the general balance due. To the extent of the lien, the attorney is the owner and cannot be called upon to pay over that part of the money in his hands.
3. ———. The right of an attorney at law to a general or retaining lien is not affected by the fact that the client is a personal representative and that the services were rendered and the money received on behalf of an estate.
4. **Executors and Administrators.** A secured creditor may rely

upon his security and is not required to file a claim in the estate proceedings.

5. ———. The personal representative of an estate is a fiduciary in his relation to the beneficiaries of the estate of the deceased. As such he is required to make a full disclosure of all facts within his knowledge which are material for the beneficiaries of the estate to know to protect their interest.

6. ———. Before the administrator of an estate can be held liable to the heirs of a deceased for a violation of the fiduciary relationship, the heirs must show that they were damaged as a result of that fact.

7. Executors and Administrators: Attorney and Client. Where the administrator of an estate is a lawyer and performs legal services which are necessary and beneficial to the estate, such services are extraordinary within the meaning of section 30-1412, R. R. S. 1943, and the court may make an allowance as reasonable compensation for such services.

8. Executors and Administrators. The continuance of the operation of the business of a decedent is not a service required of the administrator of an estate in the common course of his duty. It is in the nature of an extraordinary service within the meaning of section 30-1412, R. R. S. 1943, and the court may make an allowance as reasonable compensation for such services.

9. ———. The compensation allowed an administrator for his services in the continuance of the operation of the business of a decedent should be the reasonable value of the time and effort expended.

Appeal from the district court for Dodge County: H. EMERSON KOKJER, Judge. Affirmed in part, and in part reversed and remanded with directions.

William G. Line and Theodore W. Vrana, for appellants.

A. C. Sidner and Charles H. Yost, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

Alfred Anderson died intestate on May 6, 1959. He was survived by his widow, Myrth Anderson; a daughter, Gloria Youngquist; and a son, Donald N. Anderson.

During his lifetime the deceased operated a cafe at

Fremont, Nebraska, known as Al's Restaurant. In addition to the cafe the deceased owned a 1956 Oldsmobile automobile and had approximately $2,700 in cash at the time of his death. This was the property which was available to pay debts of over $12,000 and the expenses of administration.

On May 7, 1959, William H. Lamme, a member of the firm of Spear, Lamme & Simmons, was appointed special administrator of the estate upon the petition of the widow. On June 1, 1959, he was appointed administrator of the estate.

The cafe was sold on November 30, 1960. In August 1961, the heirs of the deceased filed an application in the county court to set aside the sale of the cafe, remove the administrator, and require him to account. The administrator filed an answer to the application of the heirs and also a final report and petition for discharge. The heirs filed objections to the report. The county court set the petition for hearing and ordered that notice of hearing be given, which was given as required by law.

The county court denied the application to remove the administrator, overruled the objections to the report of the administrator, and approved the report, including an allowance of $9,000 to the administrator for his services as attorney and administrator. The heirs then appealed to the district court from both orders.

At the trial in the district court the appeal from the order denying the application to remove the administrator was abandoned. The district court approved the report of the administrator except as to an item of $1,008 for attorney's fees to Spear, Lamme & Simmons for services concerning a claim for damages resulting from a fire that occurred in 1958. Both parties filed motions for rehearing which were overruled. The heirs then appealed to this court and the administrator cross-appealed.

The assignments of error all relate to the disposition of the proceeds of the claim for the fire loss, the sale

of the cafe, and the fee allowed the administrator for his services as attorney and administrator. In disposing of these matters we will discuss them separately.

On May 30, 1958, the cafe was damaged by fire. A part of the loss was covered by insurance. The insurance carriers paid $2,887.50 to the deceased and took subrogation agreements from him.

The insurance carriers and the deceased then presented claims against third parties who were alleged to have negligently caused the fire. Both the insurance carriers and the deceased were represented by Spear, Lamme & Simmons. The deceased died while the claims were pending. The administrator succeeded to the interest of the deceased and the services of the attorneys who had represented the deceased in his lifetime were continued. More than 6 months later a settlement of the claims was negotiated.

The administrator then filed an application in the county court requesting authority to complete the settlement. The application alleged that a total sum of $6,247.14 had been agreed upon and that of this amount $2,887.50 was due the insurance carriers by reason of their rights of subrogation. The county court entered an order approving the settlement and directed that the proceeds of the settlement be paid to the estate and the insurance carriers in the amounts alleged in the application. The proceeds of the settlement were distributed in accordance with the order of the county court except that Spear, Lamme & Simmons deducted 30 percent ($1,007.82) from the amount due the estate as attorney's fees and paid the net amount ($2,351.82) to the administrator.

The heirs contend, first, that the administrator is liable for the $2,887.50 paid to the insurance carriers. This payment was made pursuant to an order of the county court, and the order of the county court is a complete defense so far as any personal liability of the

administrator is concerned. Weeke v. Wortmann, 84 Neb. 217, 120 N. W. 933.

The contention of the heirs is based upon a theory that the insurance carriers were required to file claims in the estate proceedings before they could obtain their share of the proceeds of the settlement of the claim. The deceased was not indebted to the insurance carriers as a result of the payments made to him during his lifetime by the insurance carriers. By reason of their payment of a part of his loss, the insurance carriers were subrogated to the rights of the deceased against the third parties whose negligence caused the fire. Although the insurance carriers had a right to proceed against the third parties in the name of the deceased or his administrator, neither the deceased nor the administrator had any beneficial interest in the part of the recovery that was due the insurance carriers. As to that part of the recovery the administrator was a trustee for the benefit of the insurance carriers. There is no merit in the contention of the heirs with respect to the $2,887.50 paid to the insurance carriers.

The heirs next contend that the administrator is liable for the $1,007.82 deducted as attorney's fees by his firm from the share of the proceeds of the settlement due the estate. This is the item in the report of the administrator which the district court did not approve.

The heirs contend that the fee arises from a contract made by deceased during his lifetime and that the failure of the administrator or his firm to file a claim in the proceedings defeats any right to compensation for their services. There is a further contention that the administrator was barred from testifying about the transaction by reason of section 25-1202, R. R. S. 1943. At most, this contention of the heirs would be applicable only to services performed before the death of the deceased. Services performed by or for the administrator after the death of the deceased would be an expense of administration and not indebtedness of the deceased.

An attorney at law has a general or retaining lien for the balance of compensation due him upon money in his hands belonging to his client. § 7-108, R. R. S. 1943. The lien extends to the whole indebtedness covering the general balance due. To the extent of the lien the attorney is the owner and cannot be called upon to pay over that part of the money in his hands. Van Etten v. State, 24 Neb. 734, 40 N. W. 289, 1 L. R. A. 669. The right of lien is not affected by the fact that the client is a personal representative and that the services were rendered and the money received on behalf of an estate. Burleigh v. Palmer, 74 Neb. 122, 103 N. W. 1068. A secured creditor may rely upon his security and is not required to file a claim in the estate proceedings. Crawford State Bank v. McEwen, 132 Neb. 399, 272 N. W. 226. The deduction by Spear, Lamme & Simmons of 30 percent of the amount due the estate from the proceeds of the settlement and the payment of the balance to the administrator were, in effect, an assertion of a lien and a satisfaction of the amount due by a retention of the money.

There is no dispute about the reasonableness of the fee. The heirs concede that the amount of the fee is reasonable for the services performed. There being no issue over the reasonableness of the amount of the fee, that item of the report should have been approved.

On September 29, 1960, the cafe was listed for sale with the Fremont State Company. The sale of the cafe and the listing of it with the Fremont State Company was authorized by the county court. The listing agreement was signed by the administrator and all of the heirs and provided for an "asking price" of $40,000.

The sale of the cafe was actually handled by Lloyd C. Blair, an officer of the Fremont State Company. Blair obtained two offers to purchase which were submitted to the heirs. Harold Krumel offered to purchase the cafe for $30,000. Several days later Dayton Camp offered to purchase the cafe for $33,000. Both of these offers were

rejected by the heirs. Shortly after the Camp offer had been rejected, Krumel submitted a written offer to purchase the cafe for $33,500. This offer was accepted in writing by the administrator and all of the heirs on October 28, 1960. The controversy arises out of the fact that the heirs did not know that Blair had agreed to and did assist Krumel in financing the purchase of the cafe. Blair made a full disclosure of his interest in the transaction to the administrator, but the administrator did not advise the heirs that Blair had a personal interest in the transaction.

The personal representative of an estate is a fiduciary in his relation to the beneficiaries of the estate of the deceased. As such he is required to make a full disclosure of all facts within his knowledge which are material for the beneficiaries of the estate to know to protect their interest. Johnson v. Richards, 155 Neb. 552, 52 N. W. 2d 737.

It is unfortunate that the administrator failed to advise the heirs that Blair had an interest in the offers to purchase which had been submitted by Krumel. But, before the administrator can be held liable to the heirs, they must show that they were damaged. The theory of the heirs is that the cafe could have been sold for $40,000 and would have been sold for that amount if they had known about Blair's interest in the transaction.

The evidence is that when the deceased died, the cafe equipment had a depreciated value of $8,400. During the course of administration, $7,000 in new equipment was purchased. At the time of the sale the depreciated value of the cafe equipment was $10,600. The lease had a remaining term of 2 years and 10 months. There was a controversy with the lessor as to whether the lease had terminated when the deceased died, and there was difficulty in securing the consent of the lessor to an assignment of the lease. In June 1960, Blair and an experienced restaurant operator had appraised the cafe and had advised the administrator that

in their opinion the cafe could be sold at that time for between $20,000 and $25,000. Although the cafe did a large volume of business, it produced a comparatively small net return.

There was evidence that at one time Camp had told Blair that if Camp could get the backing, he would pay the full asking price of $40,000. However, when Camp finally did get backing and made an offer to purchase, it was for $33,000. When Blair notified Camp that his offer had been rejected, Blair further advised Camp that he would have to increase his offer if he wanted to buy the cafe. Camp's reply was that he had no further backing, and that he would "see what happens," and talk about it later. Blair testified that he checked and found that Camp could not obtain the lease. There was also evidence to the effect that Blair did not contact another possible prospective purchaser after the $33,500 offer had been received. Although the heirs knew about Blair's interest soon after the cafe had been sold, there is no evidence that they took any action as against the purchasers to attempt to rescind the sale.

The evidence, when considered as a whole, establishes that the cafe sold for a fair price. In fact, if Blair had not offered to assist Krumel, it is doubtful whether the cafe could have been sold to another purchaser at the price offered by Krumel. We conclude that the evidence fails to establish that the heirs were damaged by the failure of the administrator to advise them that Blair had an interest in the offers to purchase submitted by Krumel.

The report of the administrator listed as a disbursement an item of $9,000 to William H. Lamme for administrator's and attorney's fees. This item of the report was approved over the objections of the heirs by both the county court and the district court.

The amount which may be allowed to an administrator as compensation for his services is regulated in the first instance by statute. Section 30-1412, R. R. S. 1943, pro-

vides that an administrator "shall be allowed commissions upon the amount of personal estate collected and accounted for by him * * * as follows: For the first thousand dollars at the rate of five per cent; for all above that sum and not exceeding five thousand dollars, at the rate of two and one-half per cent; and for all above five thousand dollars at the rate of two per cent. * * * In all cases such further allowances may be made as the county judge shall deem just and reasonable for any extraordinary services not required of an executor or administrator in the common course of his duty."

The heirs contend that the administrator has made no claim for compensation for extraordinary services and is now estopped from making such a claim; and that the administrator has claimed that his fees should be computed by applying the statutory schedule to the gross receipts, including the gross receipts from the operation of the cafe. Although there is some evidence which tends to support this theory, we do not think that it is a correct interpretation of the record. Apparently there is some confusion on the part of both the administrator and the heirs as to the meaning of the term "extraordinary services" as used in section 30-1412, R. R. S. 1943.

The administrator has claimed a fee of $9,000 for all of his services. As we view the record, the question to be determined is whether that is the reasonable value of the services to the estate in this case.

The administrator in this case was a lawyer and performed all of the legal services for the estate. Such services are extraordinary within the meaning of the statute. Where an administrator performs legal services which are necessary and beneficial to the estate, the court may make an additional allowance as reasonable compensation for such services. In re Estate of Wilson, 83 Neb. 252, 119 N. W. 522. The heirs admit that if the administrator is entitled to any compensation, he is entitled to reasonable compensation for the legal serv-

ices which were furnished to the estate in this case. In their brief the heirs suggest $1,201 as a proper allowance for such services.

The heirs contend that the allowance to the administrator for his services to the estate other than legal services should be computed by applying the statutory schedule to the amount by which the receipts exceeded the disbursements. By their computation this would result in an allowance of $1,072.38 or a total of $2,273.38.

The administrator in this case was appointed as special administrator on the day after the deceased died. He immediately took charge of the cafe and supervised its operation from May 7, 1959, until December 1, 1960, when it was sold. Donald N. Anderson, one of the heirs, was employed as manager of the cafe at a salary of $100 per week. His wife was also employed at a salary of $75 per week.

During the period of approximately 19 months in which the administrator was responsible for the operation of the cafe, he took charge of the receipts, which were in excess of $400,000, and paid all of the bills. There was an average of 45 employees at the cafe and a high rate of turnover in personnel. In one year it was necessary to prepare 129 W-2 forms. Donald N. Anderson was in the office of the administrator almost daily and, frequently, he and the administrator would confer about problems at the cafe. There were matters with the lessor which required the services of the administrator. There was trouble with the heating and cooling systems, with the plumbing, and with the cafe equipment. There was no accounting system for the cafe and no provision for protecting supplies from pilferage. One supplier had a claim for an account of more than $7,000 which extended back over a year and a half which required analysis and investigation. The cafe operated under licenses, including a beer license, which required the attention of the administrator. The administrator prepared all of the reports and returns re-

quired by the Internal Revenue Service and other governmental agencies. In summary, the operation of the cafe required a part of the time of the administrator almost every day during the 19-month period of his supervision.

The continuance of the operation of the business of a decedent is not a service required of an administrator in the common course of his duty. It is in the nature of an extraordinary service for which an additional allowance may be made under the statute. In re Estate of Wilson, *supra*. See, also, Annotation, 66 A. L. R. 515. The compensation allowed an administrator for such services should be the reasonable value of the time and effort expended.

The administrator produced three lawyers who testified as expert witnesses as to their opinion of the value of the services of the administrator to the estate. Their testimony placed the value of all services at between $9,000 and $13,500 and the value of the legal services considered separately at between $1,150 and $2,000. The heirs presented no expert testimony and claimed that such evidence was inadmissible.

In arriving at our conclusion as to what was the reasonable value of the services of the administrator in this case we have considered the entire record, including the findings of the county court and district court. We have given consideration to the fact that it was necessary to sell the cafe before the claims could be paid and the estate closed; that the cafe had more value if sold as a going business; and that the report of the appraisers in June 1960 recommended that the cafe be operated for a year. We have also given consideration to the fact that the operation of the cafe enabled the administrator to pay a widow's allowance of $4,800 during the first year; that the heirs have received approximately $21,500 cash in advance distribution; and that there is a remaining balance of approximately $3,500 in cash for distribution to them. We conclude that $9,000

is a fair and reasonable allowance to the administrator for his services to the estate in this case.

The judgment of the district court is affirmed except as to the finding and judgment that the account of the administrator should be surcharged in the amount of $1,008. As to that finding and part of the judgment, the judgment is reversed and the cause remanded with directions to enter a judgment in conformity to this opinion and to certify it to the county court.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RICHARD HOYE, APPELLEE, IMPLEADED WITH WAYNE WIEMERS, APPELLANT.
118 N. W. 2d 325

Filed November 30, 1962. No. 35284.

1. **Burglary.** An attempt to commit any of the acts prohibited by section 28-532, R. R. S. 1943, constitutes the criminal offense of attempted burglary as that offense is defined in section 28-532.01, R. S. Supp., 1961.
2. ———. Anyone attempting to break and enter a storehouse is guilty of the offense of attempted burglary.
3. ———. A storehouse, within the meaning of the statute, is some kind of structural barrier to ingress of the public.
4. ———. A gasoline tank used for storage of gasoline for the purposes of the owner not connected with or a part of another structure is a storehouse within the meaning of the statute.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Andrew J. McMullen, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee State of Nebraska.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is a criminal action wherein in an information filed by the county attorney of Buffalo County, Nebraska, in the name of the State of Nebraska, plaintiff, Richard Hoye and Wayne Wiemers, defendants, were charged with the offense of attempted burglary, which offense, it was alleged, was committed on or about December 3, 1961. The alleged attempted burglary was the breaking and attempted entering of a gasoline storage tank, which tank was denominated a storehouse.

The two were convicted of the offense and Hoye was sentenced to serve a term of 1 year in the Nebraska State Reformatory for Men, and Wiemers was sentenced to serve a term of 1 year in the Nebraska State Penitentiary. Wiemers filed a motion for new trial or in the alternative for judgment notwithstanding the verdict. This motion was overruled. From the order overruling the motion and the judgment sentencing him to serve the term imposed he has appealed. Hoye is not a party to the proceeding in this court. Wiemers will therefore hereinafter be referred to as the defendant.

There is no dispute in the record as to the facts which are by the information alleged to be a criminal offense. The only substantial contention of the defendant is that the acts charged against the defendant and proved do not constitute the criminal offense of attempted burglary within the meaning of the laws of this state.

The brief of the defendant contains four separate assignments of error. They do not, however, require specific mention for the reason that they must stand or fall upon a determination of whether or not the acts of the defendant amounted to the criminal offense charged.

The facts are that on and prior to the date of the offense charged herein, the Kearney Country Club of Kearney, Nebraska, had and maintained on its grounds a steel gasoline tank with a capacity of about 300 gallons. The tank was not within or connected with any other building or structure, but was located 5 to 10 feet

from the nearest building. The tank was attached to steel poles which were anchored in bases of concrete. There was a spigot in the tank for the removal of gasoline from the tank protected by a metal hasp to which was attached a padlock, the purpose of which was to prevent access to the gasoline in the tank. Unauthorized access could be had by breaking the lock, removing the hasp, and turning the spigot.

The purpose of the tank was to have a supply of gasoline to be used to furnish fuel for the motor equipment used by the Kearney Country Club. It was subject to withdrawal by certain employees of the club.

In the early morning of December 3, 1961, noises were heard in the vicinity of the tank by employees of the club. They went out and identified the defendant in the immediate vicinity of the tank. He escaped with someone else in an automobile. The described protective features of the tank were broken making available a withdrawal of gasoline from the tank. These were found in the vicinity of the tank.

On the trial the jury effectually found that the evidence was sufficient as proof that the defendant had committed these acts and the defendant does not dispute here the validity of that finding, and for these reasons it does not appear that the evidentiary details require statement herein.

The basic contention of the defendant is that the gasoline tank was not a storehouse within the meaning of the statute defining the crime of burglary. This definitive statute is section 28-532, R. R. S. 1943. Section 28-532.01, R. S. Supp., 1961, provides as follows: "Whoever attempts any act prohibited by section 28-532, shall be guilty of attempted burglary * * *." One of the acts prohibited is the breaking and entering of a storehouse.

This court, in Metz v. State, 46 Neb. 547, 65 N. W. 190, approved from the Century Dictionary the following as a proper definition of storehouse: "A house in which things are stored; a building for the storing of grain,

food-stuffs, or goods of any kind; a magazine; a repository; a warehouse; a store." This was approved in Steele v. State, 80 Neb. 9, 113 N. W. 798, 127 Am. S. R. 741. In the latter case it was said: "The term storehouse, as used in our statute, necessarily means some kind of a structural barrier to the ingress of the public. A repository or receptacle where goods are stored is a storehouse. Such a structure need not be a house or a building, strictly speaking. It is enough if it is shown to be a structure properly barred from entrance by the public, where goods are stored and kept."

Moss v. Commonwealth, 271 Ky. 283, 111 S. W. 2d 628, was a case wherein the court held that a gasoline storage tank buried in the ground was a storehouse.

In the light of the definitive language contained in these cases, the conclusion reached is that within the meaning of the statute the gasoline tank described in the evidence was a storehouse. The judgment of the district court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD P. EASTER, APPELLANT.
118 N. W. 2d 515

Filed December 7, 1962. No. 35184.

1. **Criminal Law: Trial.** Where there is distinct evidence on each material fact necessary to establish the guilt of the accused before the jury, a verdict against him will be upheld, although such testimony may be contradicted by other witnesses.
2. ———: ———. A defendant may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made.
3. ———: ———. While it would not be improper to admonish the jury in the instructions to disregard any testimony ordered stricken during the course of the trial, it is not a necessary instruction.
4. **Criminal Law: Evidence.** As a general rule, evidence of other

crimes than that with which the accused is charged is not admissible in a criminal prosecution.

5. ———: ———. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. Whether such other alleged crimes are too remote rests largely in the discretion of the trial court.
6. **Constitutional Law: Searches and Seizures.** All evidence obtained by searches and seizures in violation of the federal Constitution is inadmissible in a criminal trial in the courts of this state.
7. ———: ———. The issues of unlawful arrest and unconstitutional search and seizure are questions for the trial court and are not subject to reconsideration by a jury.
8. **Corporations: Searches and Seizures.** Where one availed himself of the privilege of doing business as a corporation, even though its sole shareholder, documents which he could have protected from seizure, if they had been his own, could be used against him, even though they were illegally obtained from the corporation.
9. **Criminal Law: Searches and Seizures.** Immunity against the use of illegally obtained evidence cannot be claimed by a defendant if he does not own or have a proprietary interest in the property which has been seized.
10. **Criminal Law.** Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Byron M. Johnson, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a criminal action prosecuted in the name of the State of Nebraska, plaintiff, appellee herein, against Donald P. Easter, defendant, appellant herein. Defend-

ant was charged by information filed by the county attorney in the district court for Scotts Bluff County.

Upon trial, defendant was found guilty by the jury and was sentenced to the Nebraska State Reformatory for a period of from 3 to 5 years. Defendant appeals to this court.

There are 40 separate assignments of error. We do not deem it necessary herein to list these specific assignments. We will allude to many of them specifically but, where appropriate, reference will be to the general subject matter involved.

The portion of the information essential to a review of the questions raised in this appeal is as follows: "* * * defendant on the 12th day of June, 1961, in the County of Scotts Bluff and State of Nebraska, then and there being, did then and there, wilfully, unlawfully and feloniously and fraudulently obtain from Katie Betz $150.00 with intent to cheat and defraud her by making the following false and fraudulent representations: (1) That defendant was bonded in the sum of $10,000.00, when in fact he had no such bond; (2) That Katie Betz would be employed by A.I.L., Inc., when in fact neither he the said defendant nor A.I.L., Inc., ever intended to employ Katie Betz: (3) That the $150.00 was for a 'Bond of Intent' to A.I.L., Inc., when in fact the $150.00 was paid to defendant in his name and treated by defendant as income either of himself or A.I.L., Inc., and not as a bond: and Katie Betz, relying upon such false and fraudulent representations made by defendant, gave a check for $150.00 payable to defendant Donald L. (sic) Easter which he presented for payment at the bank on which it was drawn and received payment, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the people of the State of Nebraska."

There is evidence from which the jury could have determined the facts to be as set out hereinafter. On June 12, 1961, defendant, being in Scottsbluff, Nebraska,

telephoned Mrs. Katie Betz, an elderly retired farm lady living alone in that city, and asked her if she " 'would like to make a little extra money.' " When he received an affirmative reply, he asked permission to come up to her home to explain his proposition to her. He was at her home approximately 10 minutes after she said " 'All right.' " His proposition was that for answering telephone calls connected with the business of A.I.L.,Inc., for 2 or 3 hours a day, she could earn about $900 a year. A.I.L., Inc., is an Oregon corporation, which purports to be able to secure discounts for its members on various articles and services by eliminating some of the costs of the "middleman" in the selling process. The letters themselves purport to represent "Anti-Inflation League."

The defendant had been soliciting representatives in other states for several months. These representatives were in each instance elderly ladies who had been contacted by a phone call. Nothing appears in the record as to how their names were obtained. These representatives were told that their duties would be to process inquiries from members of A.I.L., Inc., who called to determine what they could buy at a discount and from whom. These representatives were to be paid by receiving a percentage of the membership fees collected from members in the area. They were also told that it was necessary that they give a bond called a "Bond of Intent" in the amount of $150, to guarantee their good faith, and that they would hear from the defendant in 30 or 40 days. At that time they would receive instructions on their duties as well as a written agreement as to their percentage of the membership fees.

The defendant testified that he and his wife were the only officers of A.I.L., Inc., and that he regarded himself as one and the same as A.I.L., Inc. The money obtained from the ladies for their "Bonds of Intent" was used by him for his personal expenses or was sent to his wife to be deposited in their personal savings account. Several prospective representatives from Nebraska and

some from other jurisdictions testified. Although the "Bond of Intent" money had been paid, none of them had ever received instructions from the defendant or the corporation as to their specific duties, nor were they given information as to where any prospective callers might secure articles or services at a discount. In fact, the defendant testified that the only agreement he or the corporation had with anyone who would supply articles or services at a discount was the dealer who sold him his car and two or three others in Oregon whose names and addresses were too fragmentary to be very informative. There had been no agreements made in Nebraska, although several aged ladies had given "Bond of Intent" deposits to serve as representatives. Further, there is no evidence in this record which would indicate that any memberships had been sold. The most we find is a suggestion in the record that the defendant, some time in the future, expected to hire agents to sell memberships.

The foregoing is the barest outline of the method of operation used by the defendant. There is no dispute in this case but that the defendant did ask for and receive a check for $150 from Katie Betz which was for a purported "Bond of Intent"; that this check was made payable to him personally; and that it was immediately cashed by him. Katie Betz testified this check was given in reliance on defendant's representations.

Defendant questions the sufficiency of the evidence to sustain a conviction. As we view the record, there is evidence on all the material elements which we do not deem necessary to detail herein. In the early case of Dutcher v. State, 16 Neb. 30, 19 N. W. 612, we said: "Where there is distinct evidence of each material fact necessary to establish the guilt of the accused legally before the jury, a verdict against him will be upheld, although such testimony may be contradicted by other witnesses."

There is no question that a jury could properly find

the defendant guilty of obtaining money under false pretenses. It would severely strain credulity to describe defendant's method of operation in any other manner. The questions to be determined herein are whether the defendant's constitutional rights were protected, and whether he was accorded a fair trial.

The record clearly indicates that the defendant was apprehended at Sidney, Nebraska, about 5 p. m., June 15, 1961, at the request of the Scotts Bluff County sheriff, who held a warrant for his arrest. He was placed in the Cheyenne County jail until approximately 9:15 p. m., when he was delivered to a deputy sheriff from Scotts Bluff County. Before leaving Sidney, defendant requested and was granted permission to get a suitcase which was locked in the trunk of his car. The defendant testified that his brief case, which at that time was under the deputy's arm, had been on the front seat of his car the last time he saw it. When the defendant arrived at the county jail in Gering, he started to take the suitcase and the brief case upstairs with him, but they were taken from him to be placed in the property room which was near the sheriff's office.

The next morning, out of the presence of the defendant and without the defendant's knowledge, the deputy sheriff inspected the contents of the brief case and the suitcase. That afternoon, the defendant was brought into the county courtroom, and in the presence of the deputy and the court reporter, was examined by the county attorney. On that occasion, the brief case and the suitcase were on a table in front of the defendant. The county attorney testified that when he asked the defendant if he had any objection to his looking in the suitcase and the brief case, the defendant said: " 'No. I operate a legitimate business. I have nothing to hide.' " The deputy sheriff testified: "A We had the brief cases laying on the table there, and when Mr. Easter sat down, why, you'd asked him if he had any objections to going through them and using what was said in there. Q

And what did Mr. Easter say? A He said he had no objections to it at all." This statement was denied by the defendant. Subsequently, and out of the presence of the defendant, the county attorney did examine the papers in the brief case and the suitcase to obtain the names of witnesses. These he contacted and some of them appeared as witnesses at the trial.

Defendant's first assignment of error concerns the overruling of his motion to require the State to specify the statute and the subdivision of the statute upon which the State was relying in making the charge. The basis of the defendant's motion is his constitutional right to be informed of the nature and the cause of his accusation. "In all criminal prosecutions the accused shall have the right * * * to demand the nature and cause of accusation * * *." Art. I, § 11, Constitution of Nebraska. The motion was a proper one. The section of statute on which he was charged on motion should have been made a matter of record. The ruling herein, however, was error without prejudice. The defendant understood he was charged under section 28-1207, R. R. S. 1943. Before the preliminary hearing in county court, the defendant filed a motion to abate and strike each specification of the complaint because it did not charge a crime under section 28-1207, R. R. S. 1943. Further, his brief concedes that he was able to ascertain that he was charged under section 28-1207, R. R. S. 1943, and that the county attorney advised him that the charge was brought under that section. It is evident also that the complaint as drawn only charged an offense under the first subdivision of section 28-1207, R. R. S. 1943.

Defendant's assignments of error Nos. 2, 3, 4, 5, and 6 cover the overruling of his motion to quash, plea in abatement, demurrer, and motion to strike and require the State to elect. These were all filed on the 29th day of August 1961. The defendant was arraigned on the same day, and upon the advice of counsel stood mute. The court entered a plea of not guilty. From the state

of the record itself, it is not possible to tell whether the motions and pleas were filed prior to the time the defendant was arraigned. However, the defendant has brought up by supplemental transcript the affidavit of the district judge that the motions, plea, and demurrer were ruled on before the court entered a plea for the defendant. For the purpose of this opinion we will consider the record as so modified.

Defendant argues that the information did not sufficiently inform him under what subdivision of the statute he was charged. Concededly, the information is poorly drawn. However, it is apparent that what the defendant refers to as counts and subdivisions are no more than purported false and fraudulent representations made, allegedly to cheat and defraud Katie Betz of $150. The wording of the information is such that defendant could only be charged with obtaining money on representations he knew to be false with the intent to defraud and cheat Katie Betz. As suggested, it is evident that the complaint as drawn only charged an offense under the first subdivision of section 28-1207, R. R. S. 1943. The defendant was fully and sufficiently informed by the information of the charge against him. The motion to quash was properly overruled.

Defendant's plea in abatement set forth many allegations, but the evidence thereon was directed to the manner in which the State obtained its evidence, which will be discussed hereafter. There is no merit to defendant's contention that he was illegally taken into custody. After a warrant had been issued in Scotts Bluff County, the sheriff at Sidney was requested to apprehend the defendant for the Scotts Bluff County sheriff. He was taken into custody and delivered to a deputy sheriff of Scotts Bluff County who came to Sidney with the warrant. There was probable cause for the defendant's arrest, and his arrest was legal.

Defendant's general demurrer was without merit, and was properly overruled. The motion to strike and to

require the State to elect upon which of the separately numbered false pretenses the State would rely was also properly overruled. As suggested heretofore, the numbered portions of the information were the representations upon which the State was relying to prove the obtaining of the $150 by false pretenses. They constituted but one offense and were specifically set out to advise the defendant of the specific representation upon which the State based its case.

The defendant's assignments of error Nos. 8, 9, 10, 11, 12, 13, and 14 are directed to the court's refusal to give instructions tendered by the defendant. In each instance, the instructions tendered either did not reflect the charge specified in the information or were sufficiently covered by instructions given by the court. There was no error in the refusal of tendered instructions.

Defendant's assignments of error Nos. 15 to 25 cover instructions given by the court. The principal instruction complained of in the brief is instruction No. 13, which defined false pretenses. While the instruction is not very artfully drawn, it is not prejudicially erroneous but in fact is probably more favorable to the defendant than it would have been if it had been more carefully drawn. Defendant may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made. Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632.

The defendant urges that the court in effect withdrew essential elements of the case from the jury by failing to specifically instruct on certain particulars of the law and the evidence. We do not so construe the instructions. When the instructions are read in their entirety, there is no merit to this contention. They correctly state the law applicable to the crime charged, and in no sense are prejudicially erroneous. If anything, the instructions narrow the scope of the charge and were more favorable to the defendant than they might have been. Grandsinger v. State, *supra*.

Defendant's assignment of error No. 30 complains that the court failed to instruct the jury that testimony which had been stricken or which the jury had been admonished to disregard was not evidence in the case and must not be considered by the jury in its deliberations. Where testimony had been stricken, it was not before the jury, and while it would not be improper to admonish the jury in the instructions to disregard any testimony ordered stricken during the course of the trial, it is not a necessary instruction.

Defendant's assignment of error No. 32 involves the admission, over objection, of testimony of similar transactions with other persons at different times and places. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. Erving v. State, *ante* p. 90, 116 N. W. 2d 7. There is, however, a recognized exception to this rule. As we said in Sall v. State, 157 Neb. 688, 61 N. W. 2d 256: " 'Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. Whether such other alleged crimes are too remote rests largely in the discretion of the trial court.' " The evidence about which the defendant complains was properly admitted under this rule. The trial court amply protected the rights of the defendant in his instructions to the jury by carefully defining the limitations placed upon the admission of the testimony of similar acts and transactions.

The principal questions raised by the defendant revolve around the contention that his records and papers were illegally seized in violation of the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States. There is no question but that the federal exclusionary rule is now the law of the land. It may no longer be considered as a mere rule of evidence but is a part and parcel of the Constitution. Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081,

states: "All evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state court."

Has there been an illegal search and seizure herein? The Fourth Amendment does not forbid all searches without a warrant incident to a valid arrest. The constitutional issues should be whether the searches and seizures are reasonable. This is certainly true when we understand that there is no uniform body of law which defines what constitutes lawful arrest or reasonable search incident to lawful arrest. It is always a problem of degree, of what is reasonable or unreasonable under the circumstances.

There is no evidence in this record that the defendant's car was searched incident to an arrest other than the implication to be drawn from defendant's testimony. He testified he left his brief case on the front seat of his car, that he locked the car and gave the key to the police officers at Sidney, and that when he next saw his brief case, the deputy sheriff of Scotts Bluff County had it under his arm. This testimony is disputed by the deputy sheriff, who testified defendant took it from the car. Defendant does admit that he himself unlocked the trunk of his car and took out his suitcase. In any event, we would hold that taking possession of a brief case lying on the seat of an automobile being driven by the defendant would be reasonably incident to an arrest.

The defendant strenuously argues that it was the subsequent use of the papers in the suitcase and the brief case to secure the names of the women previously contacted by defendant which violated his constitutional rights. The defendant's volunteered statement during the trial to the county attorney, during an exchange between counsel, reflects his position: "In other words, if you hadn't had access to something you shouldn't have had access to in the first place you wouldn't have had any case."

As we view the record, there was sufficient evidence (set out heretofore) by which the court could find that the defendant consented to an inspection of the papers in the two cases. The rights granted by the Fourth and Fifth Amendments to the Constitution of the United States may be waived. United States v. Jones, 204 F. 2d 745. Defendant argues, however, that the issue of unlawful arrest and unconstitutional search and seizure was an issue that should have been submitted to the jury by proper instruction, but he fails to furnish authority other than his own statement for this position. Undoubtedly, defendant is confusing this situation with the special procedure required in this jurisdiction regarding confessions. There is no parallel between the two situations. The rule in the instance of confessions is justified by the fact that the jury must necessarily be informed of the circumstances surrounding the confession to be able to properly evaluate it. The probative value of evidence obtained by search and seizure, however, does not depend on whether the search or seizure was legal, and no purpose would be served by having a jury make a second determination of that issue.

As was well said in People v. Gorg, 45 Cal. 2d 776, 291 P. 2d 469: "Moreover, the legality of a search or seizure will frequently depend on whether the officer had reasonable cause to make an arrest, and since such cause is not limited to evidence that would be admissible at the trial on the issue of guilt * * * evidence that was otherwise inadmissible and prejudicial would frequently be presented to them if the jury were required to pass on the legality of the search or seizure."

We hold that the issues of unlawful arrest and unconstitutional search and seizure are questions for the trial court and are not subject to reconsideration by a jury. When the issue is raised both sides present their evidence, and, as with the usual challenge to the admissibility of evidence, the decision is made by the trial judge. The decision is then subject to review on ap-

peal, but will stand if sustained by the evidence.

There is a more cogent reason herein, however, as to why there is no merit to the defendant's position. Defendant has chosen to operate as a corporation. Although he could see nothing wrong in depositing alleged corporate funds in his own name or using the funds for his own purposes because he considered himself one and the same as the corporation, the fact remains that he dealt with the complaining witness as the president of a corporation. It is obvious that all of the papers from which the information for the trial was derived were the property of the corporation. We feel this is a situation embraced by the rule announced by the Circuit Court of Appeals for the Second Circuit in Lagow v. United States, 159 F. 2d 245: "Where one availed himself of the privilege of doing business as a corporation, even though its sole shareholder, documents which he could have protected from seizure, if they had been his own, could be used against him, even though they were illegally obtained from the corporation, * * *." We approve of this rule and hold that immunity against the use of illegally obtained evidence cannot be claimed by a defendant if he does not own or have a proprietary interest in the property which has been seized. See 2 Wharton's Criminal Evidence (12th ed.), § 700, p. 706.

Defendant complains of the severity of the sentence. Where punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion. Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380. In view of the fact that the record indicates that the defendant specialized in victimizing aged women, who in most instances could not afford the loss, the sentence was more lenient than the record might justify. There was no abuse of discretion.

For the reasons set out above, we find no error in the

record prejudicial to the rights of the defendant, and the judgment herein is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE APPLICATION OF BLACK HILLS STAGE LINES, INC. BLACK HILLS STAGE LINES, INC., NORFOLK, NEBRASKA, APPELLEE, V. GREYHOUND CORPORATION, OMAHA, NEBRASKA, ET AL., APPELLANTS.

118 N. W. 2d 498

Filed December 7, 1962. No. 35250.

1. **Motor Carriers.** The purpose of the Nebraska Motor Carrier Act is the regulation of motor carrier transportation in the public interest. Its purpose is not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices.
2. ———. In determining the issue of public convenience and necessity, controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.
3. **Public Service Commissions: Motor Carriers.** Where there is evidence to sustain the factors advanced by the parties which are required to be considered by the Nebraska State Railway Commission by section 75-222, R. R. S. 1943, the determination of the public interest is for the commission and not the courts.
4. ———: ———. Where there is evidence to sustain a finding of the Nebraska State Railway Commission that the benefit which would be denied the general public outweighs the detriment accruing to existing carriers, it cannot be said that the granting of a new certificate is unreasonable or arbitrary.

Appeal from the Nebraska State Railway Commission. Affirmed.

Jack Devoe, James E. Ryan, and John C. Coupland, for appellants.

Viren & Emmert and Kaye E. Wolcott, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

The Black Hills Stage Lines, Inc., of Norfolk, Nebraska, filed its application with the Nebraska State Railway Commission for a certificate of public convenience and necessity authorizing the transportation of passengers, mail, and express from Omaha to the point where U. S. Highway No. 385 crosses the Nebraska-South Dakota state line, serving all intermediate points as a common carrier. The commission granted the certificate as requested in the application.

The granting of the application was protested before the commission by the Greyhound Corporation, Omaha, Nebraska; Fred Larsen, Jr., doing business as Winner Bus Line, Winner, South Dakota; Gale Earl, doing business as Earl Bus Line, Chadron, Nebraska; and United Motor Ways, Inc., Grand Island, Nebraska. Upon the final grant of the certificate to Black Hills Stage Lines, Inc., the four named protestants appealed to this court.

The route sought for the operation applied for was from Omaha to the Nebraska-South Dakota state line via Fremont, Norfolk, O'Neill, Valentine, and Chadron. The Greyhound Corporation is authorized to serve a route from Omaha to Norfolk, via Fremont. The Winner Bus Line has authority to serve between Norfolk and O'Neill. Earl Bus Line has authority to serve between Valentine and Chadron. United Motor Ways, Inc., is authorized to serve between O'Neill and Valentine. From the foregoing it will be noted that the route from Omaha to Chadron is served by the four protestants. The evidence shows that there is no through bus from Chadron to Omaha and it is not possible to travel the entire route without numerous interchanges and long delays. The evidence shows that the elapsed time one way between Chadron and Omaha under existing schedules of the four

protestants is in excess of 32 hours. Under the proposed schedule of the applicant it would be less than 10½ hours. It is not disputed that additional service is needed in the area west of O'Neill, no other means of transportation by common carrier being available. The record does not disclose a need for additional service east of O'Neill.

The evidence shows that an interested group of persons and civic organizations west of Norfolk organized themselves into a voluntary organization known as the Northern Nebraska Transportation Association. A committee of that organization contacted each of the protestants in an attempt to secure through service between Omaha, Nebraska, and Rapid City, South Dakota, by each or by joint operation. Protestants declined to provide such service individually although some appeared willing to furnish such service in conjunction with the others. The committee then contacted the Black Hills Stage Lines, Inc., a new corporation whose officers and stockholders are officers of the Arrow Stage Lines, Inc., a bus transportation company operating in northeast Nebraska and connecting with the routes of three of the protestants. It is the contention of protestants that if the application of Black Hills Stage Lines, Inc., is granted, the route between Omaha and O'Neill should be restricted to protect the service provided in the area by Greyhound Corporation and Winner Bus Line. On the other hand, Black Hills Stage Lines, Inc., asserts that such restricted service between Omaha and O'Neill would make the through service between Omaha, Nebraska, and Rapid City, South Dakota, economically unfeasible, and that it could not and would not establish such through service unless certificates authorizing service to all intermediate points can be obtained from the Nebraska State Railway Commission, the South Dakota Commission, and the Interstate Commerce Commission. The problem presented appears to be one of first impression in this state.

The evidence sustains the following findings: There is a public need for through service west of O'Neill. There does not appear to be a public need for additional service between O'Neill and Omaha. The grant of a certificate of public convenience and necessity is not economically feasible without service to intermediate points between Omaha and Rapid City. The institution of the proposed through service will decrease the revenue now being obtained by Greyhound Corporation on its Omaha-Norfolk route, although it will not materially affect the revenue of its overall operations. The grant of the new certificate will reduce the revenue of Winner Bus Line, Earl Bus Line, and United Motor Ways, Inc., with a strong probability that one or more of them might be compelled to cease operations because of depleted revenue.

The purpose of the Nebraska Motor Carrier Act is stated in Shanks v. Watson Bros. Van Lines, 173 Neb. 829, 115 N. W. 2d 441, as follows: "The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system. It must be permitted to exist and the law contemplates that it shall."

The protestants rely in part on Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, and In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296. These cases deal with regulated monopolies in cities where competition is wasteful and in all likelihood would result in insufficient and unsatisfactory service and extravagant rates. A transportation company under such a situation is ordinarily granted an exclusive franchise and requires the furnishing of all necessary service, the unprofitable as well as the profitable. A new

competition under such a situation will not ordinarily be permitted to compete in the lush areas of a city while the existing transportation system is required to render service in all parts of the city at rates fixed by the railway commission. These cases involve a principle not found in transportation problems in bus and truck operations outside of urban areas because they are not natural monopolies. The cited cases are not applicable to the situation before us for the reasons stated.

This court has consistently held: "In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest." Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N. W. 2d 265. See, also, Houk v. Peake, 162 Neb. 717, 77 N. W. 2d 310; Basin Truck Co. v. R. B. "Dick" Wilson, Inc., 166 Neb. 665, 90 N. W. 2d 268. The record discloses that the operation applied for will serve a useful purpose that is responsive to a public demand and need. It shows also that the service will not be adequately performed by existing carriers in the area. The question remaining for determination under the foregoing rule is whether or not the service to be performed by the applicant will endanger or impair the operations of existing carriers contrary to the public interest. We shall address ourselves to this question.

It must be conceded at the outset that the operations of the protestants will be impaired and endangered by the granting of the application of the Black Hills Stage Lines, Inc. It must also be conceded that the failure of the commission to grant the application will deprive the area of northern Nebraska west of O'Neill of transportation service which is badly needed and for which there appears to be great demand. In other words,

which is entitled to the greater consideration by the commission,—the furnishing of the badly needed service to this large area west of O'Neill and the 19 towns along the proposed route in the area, or the rights of certificate holders in the area east of O'Neill who cannot or will not provide the service but whose authorized routes will be impaired or endangered by the grant of a new application.

It is contemplated by the Nebraska Motor Carrier Act that the railway commission shall, among other things, regulate transportation by motor carriers in intrastate commerce upon the highways of Nebraska in such manner as to develop and preserve a highway transportation system properly adapted to the needs of the commerce of Nebraska. § 75-222, R. R. S. 1943. See, also, Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915; Abler Transfer, Inc. v. Lyon, 161 Neb. 378, 73 N. W. 2d 667.

We point out that the grant of a certificate of public convenience and necessity does not create a vested right which for all time circumscribes the public interest. It never was intended that the granting of certificates for local bus service on fragmentary sections of a needed through service should operate as a permanent bar to the providing of such needed service to other sections of the state. The statute contemplates that the railway commission shall weigh the need for the new service and the detriment accruing to existing carriers, and determine which is the more consistent with the public interest. Where there is evidence to sustain conflicting factors advanced by the parties, which are required to be considered by section 75-222, R. R. S. 1943, the determination of the issue is peculiarly one for the railway commission and not the courts.

In a case similar on its facts the Interstate Commerce Commission stated: "The issues for consideration include whether applicant should be granted authority to transport passengers over the entire route unrestricted,

solely over that portion of the proposed route between Antlers and Wister, or over the entire route if restricted against service at intermediate points located between Wister and Fort Smith. If limited to the former, those elderly people and others needing service to Fort Smith for medical attention would be forced to interchange with protestant at Wister. The evidence clearly establishes a need for a direct service to Fort Smith, leaving for consideration the question whether a grant of the entire route subject to the closed-door restriction between Wister and Fort Smith would be practicable and feasible. Applicant takes the position that it would not be. A closed-door passenger operation is difficult for waiting passengers to understand and may at times result in wasteful transportation. In the absence of special circumstances not here present, we are reluctant to impose such a restriction. Based on the evidence of record, it is doubtful that a partial grant, or a grant restricted in the manner sought by protestant, would enable applicant to provide a practicable and profitable operation, and we conclude that the benefits which would be denied to the general public would far outweigh any detriment occurring to protestant." Jordan Bus Co. Extension—Fort Smith, Ark., 74 M. C. C. 611. We think the reasoning of the foregoing decision supports and justifies the grant of a new certificate to the applicant in the instant case. The order of the railway commission granting the new certificate to Black Hills Stage Lines, Inc., was within the jurisdiction of the commission to make, and under the evidence it was not arbitrary or unreasonable.

For the reasons stated, the order of the railway commission granting the application of Black Hills Stage Lines, Inc., for a new certificate of public convenience and necessity for the route between the described terminal points is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM S. HENRY, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. JOHN EDWARD HENRY, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. DONALD LEE JOHNSON, APPELLANT.

118 N. W. 2d 335

Filed December 7, 1962. Nos. 35261, 35262, 35268.

1. **Receiving Stolen Goods: Criminal Law.** Guilty knowledge, which is an element of the crime of receiving stolen property, may be proved by circumstantial evidence.
2. ———: ———. Where the facts which were known to a defendant were such that a man of the age, intelligence, and experience of the defendant would know that the property was stolen, the jury can find that the defendant had guilty knowledge.
3. **Criminal Law: Evidence.** A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered.
4. **Criminal Law: Trial.** It is the better practice for a trial court to give a cautionary instruction on the testimony of an accomplice, but a failure to do so is not reversible error unless such an instruction was requested.

Appeals from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Thomas P. Lott and Jack L. Spence, for appellants.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

The defendants, Donald Lee Johnson, William S. Henry, and John Edward Henry, were charged in separate informations with receiving stolen property in violation of section 28-508, R. R. S. 1943. Upon the motion of the State the cases were consolidated before trial. The jury returned separate verdicts of guilty against the defendants. Apparently, a fourth defendant, Louis Wil-

son, was acquitted. The defendants' motions for new trial were overruled and they have appealed to this court.

The assignments of error are that the evidence is not sufficient to sustain the conviction; that the trial court erred in admitting certain evidence; and that the trial court erred in giving and failing to give certain instructions.

The evidence shows that sixteen television sets were stolen from the Chandler Furniture & Appliance Store in Omaha, Nebraska, on the night of March 28, 1961. On the evening of March 30, 1961, the defendants were riding in an automobile in the vicinity of Tenth and Hickory Streets in Omaha, Nebraska, when they were stopped by the police. Four of the stolen television sets were found in this automobile. Three more of the stolen sets were found in the trunk. Six of the television sets were in their original cartons and had the warranty and other papers stapled to the boxes. Each of the television sets had a wholesale value in excess of $100.

The defendants were arrested and taken to the police station where they were questioned concerning the television sets found in the automobile. The defendant Johnson stated that he had purchased the television sets from a stranger; that two more of the sets were at his home; and that the sets were apparently stolen. The defendant, William Henry, stated that he had been asked to go along and help remove the television sets from a house where they had been placed earlier in the day; and that he did not know that the television sets had been stolen but that they appeared to have been stolen. The defendant, John Henry, stated that he had no direct knowledge but that he felt sure that the television sets were stolen.

At the trial Johnson testified that a stranger approached him in the Apex Bar on the evening of March 28 or 29, 1961, and offered to sell him nine television sets for $200; that the stranger said that he worked for the Railroad Salvaging Company, an Omaha con-

cern; that the television sets were in a station wagon with Kansas license plates; that he examined the television sets and they appeared to be new and in good working order; that he paid the stranger $150 and placed the television sets upstairs in his home; that on the next day he asked John Henry or William Henry if he knew of anyone who would be interested in buying television sets; that he was referred to Russel Bretz, a part-time television repairman; that he took seven of the television sets to Bretz's home that afternoon and offered them to Bretz for $50 each for the portable sets and $75 for a larger one; and that Bretz said he would try to sell them.

Russel Bretz testified that William Henry, John Henry, and a third man brought the television sets to his home on the afternoon of March 30, 1961; that the sets, which appeared to be new, were placed in the basement; that from reading the evening newspaper he learned that the Chandler Furniture & Appliance Store had been burglarized and a number of television sets stolen; that he then telephoned John Henry and told him that the television sets were stolen property and that Bretz wanted them removed from his house; and that William Henry, John Henry, and three other men came to the Bretz home that evening and picked up the television sets.

John Henry testified that Johnson came to his home on the aftenoon of March 30, 1961, and asked if he knew anyone who wanted to buy a television set; that John Henry then inquired of his brother and a friend, Paige Taylor, and was referred to Russel Bretz; that he telephoned Russel Bretz; that Bretz later called back and talked to Johnson; that Johnson did not know the way to Bretz's house so William Henry went with Johnson to deliver the television sets; that when William Henry returned he stated that it "didn't look right to him" or that "he didn't like the way it was"; that later Russel Bretz telephoned him and said that the television sets

were stolen and that Bretz wanted them removed from his house; and that he gave this message to Johnson that evening and went with Johnson and William Henry to pick up the television sets.

William Henry testified that he drove Johnson to the Bretz home on the afternoon of March 30, 1961, and helped unload the television sets; that "the thing looked completely—it didn't seem right and I figured, well, I would do this much and after I went home I would wash my hands of the whole mess"; that "after I had seen there was more than one television set involved and I didn't like the looks of it, I decided I would go as far as I had gone and wash my hands completely of it"; that after returning home he told his brother that he didn't like the looks of it, that he wouldn't have anything else to do with it, and requested that his brother do the same; that Russel Bretz called later and said that he thought the television sets had been stolen from the Chandler Furniture & Appliance Store, that he didn't want anything to do with them, and wanted them removed from his house; that this message was given to Johnson that evening; and that he went along on the trip to the Bretz home that evening and helped remove the television sets from the Bretz home.

The defendants argue that the evidence is not sufficient to sustain the conviction because there is no direct evidence that the defendants knew the television sets had been stolen; that the defendants cannot be convicted merely because they may have been stupid or negligent; and that the defendants cannot be held to the standard of mentality of some imaginary man of ordinary intelligence or to the degree of diligence that should be exercised by such a man.

Guilty knowledge is an element of the crime of receiving stolen property. It arises from the requirement that the stolen property be received with intent to defraud the owner. St. Clair v. State, 103 Neb. 125, 169 N. W. 554.

The State was required to prove that each defendant knew, at the time he received the television sets, that the television sets had been stolen. This fact could be proved by circumstantial evidence. Smith v State, 123 Neb. 17, 241 N. W. 750; Hans v. State, 109 Neb. 269, 190 N. W. 577; Burris v. State, 104 Neb. 641, 178 N. W. 216. There is no rule which requires that guilty knowledge be established by direct evidence.

In determining whether each defendant knew that the television sets had been stolen, the jury was required to consider all of the facts and circumstances. The age, intelligence, and experience of each defendant is a part of the facts and circumstances. If the facts which were known to each defendant were such that a man of the age, intelligence, and experience of each defendant would know that the television sets were stolen, then the jury could find that each defendant had guilty knowledge. State v. Marcovitz, 63 N. D. 458, 248 N. W. 481. See, also, Pounds v. United States, 265 F. 242; Annotation, 147 A. L. R. 1058.

The evidence shows that the defendants were arrested while attempting to dispose of seven new television sets that had been stolen in a burglary 2 days before. It was apparent to Russel Bretz that the television sets had been stolen. The evidence was sufficient for the jury to conclude that the defendants knew that the television sets had been stolen.

The defendants complain that a written statement obtained from John Henry at the police station should not have been received in evidence. The statement when originally offered by the State was excluded upon an objection that it was hearsay as to the defendant Johnson. Later the defendant Johnson withdrew the objection and asked that the exhibit be received. The court then admitted the exhibit and noted that there was no objection by counsel for any of the defendants. The defendant cannot now complain of the admission of the statement into evidence.

The defendants also complain that Russel Bretz should not have been permitted to testify about a telephone conversation with John Henry. Since no objection was made to this testimony at the time it was offered, no objection can be made to it at this time. A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered. Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357.

The defendants contend that the trial court should not have instructed the jury as to aiders and abettors. There was evidence that after Johnson bought the stolen television sets he enlisted the help of John Henry and William Henry to dispose of them; that all three defendants delivered the sets to the home of Russel Bretz; and that all three defendants helped move the sets from the Bretz home after Bretz demanded that the sets be removed from his house. The jury could have found that John Henry and William Henry aided and abetted Johnson in committing the offense. Thus, the instruction was proper.

The defendants urge that the trial court should have given a cautionary instruction as to the testimony of an accomplice. None of the defendants requested such an instruction. Although it is the better practice for a trial court to give a cautionary instruction on the testimony of an accomplice, a failure to do so is not reversible error in the absence of a request for such an instruction. Cornell v. State, 138 Neb. 708, 294 N. W. 851.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

MAMIE ROOT ET AL., APPELLEES, V. MORNING VIEW CEMETERY ASSOCIATION, A CORPORATION, ET AL., APPELLANTS.
118 N. W. 2d 633

Filed December 7, 1962. No. 35280.

1. **Cemeteries.** The establishment, ownership, conduct, and management of cemeteries, except those owned, operated, and maintained by towns, villages, churches, and by fraternal and benefit societies, are governed by the provisions of sections 12-501 to 12-529, R. R. S. 1943.
2. ———. By the terms of statute, cemetery associations are empowered to receive gifts, devises, and bequests to be used in the performance of their functions.
3. **Wills: Charities.** A gift of property by will to an existing cemetery association is a gift to a charitable trust to be used for the purpose indicated in the will, and if no specific purpose is specified, then in the performance of the lawful objects and purposes of the cemetery association.
4. ———: ———. In case of the failure of the charitable purpose of a gift by will to a cemetery association, the res of the gift would pass to the heirs of the testator, and they would be proper parties to maintain action for recovery thereof.
5. **Wills.** No right of a citizen is more valued than the power to dispose of his property by will, and this right is in no manner based upon its judicious exercise.
6. ———. The provisions of a will must be construed with a view of carrying out the intention of the testator, and unless there is something in it contrary to the law of the state, or in contravention of public policy, it will not be declared invalid.

Appeal from the district court for Lincoln County: CLARENCE S. BECK, Judge. Reversed and remanded.

Donald H. Kelley, Wilson & Barlow, and Hollman & McCarthy, for appellants.

Beatty, Clarke, Murphy, Morgan, Pederson & Piccolo, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action in equity instituted by Mamie Root, Genevieve Singleton, Irene Huntington, Florence Mur-

ray, Margaret Cary, Willie Horner, Gertrude Schricker, and Mae Tannehill, nieces and nephew, and heirs at law, of Maria Hughes, deceased, plaintiffs, against Morning View Cemetery Association, a corporation; Walker Kelley, George Gregg, Mabel Rees, Carrie Cowles, Gerald Conneally, and Warren Smith, trustees of the association; and Elsie McGovern, executrix of the estate of Maria Hughes, deceased, defendants. The purpose of the action is to have interpreted and applied a provision of the last will and testament of Maria Hughes, deceased, whereby the residuary estate, except certain designated items of expenditure which do not require mention here, was devised and bequeathed to Morning View Cemetery Association, Lincoln County, Nebraska, in fee simple forever.

The theory on which the plaintiffs' action is predicated is that they are the heirs at law of Maria Hughes, deceased, and as such are entitled to receive to the exclusion of Morning View Cemetery Association all of the residuary estate of Maria Hughes, except $25,000, which amount they contend is the maximum the association is entitled to in the light of law and the facts, under the will.

This theory was defended against by the defendants, who asserted additionally that the plaintiffs were without legal right to maintain the action. These questions will be considered later herein.

The case was tried to the court and at the conclusion of the trial a judgment was rendered, the effect of which, to the extent necessary to state here, was to award $35,000 of the residue of the estate to the Morning View Cemetery Association, and that the balance thereof should be and become a resulting trust for the benefit of the heirs at law of Maria Hughes, deceased.

A joint motion for new trial was filed by all of the defendants except Elsie McGovern, executrix. This defendant filed a separate motion. These motions were overruled. From the judgment and the order over-

ruling the motions for new trial the defendants have appealed.

An outline of the facts, about which there is no substantial dispute, is that Maria Hughes, North Platte, Lincoln County, Nebraska, died September 29, 1959, at North Platte; that she had made a will disposing of her estate; that the will contained 12 specific bequests of $13,303, 100 shares of stock, not valued, and her clothing, personal effects, and jewelry, not valued; that the balance of the estate was declared by the will to be residue and remainder; and that this residue and remainder, after the payment of certain expense items which it is not deemed necessary to enumerate herein, was devised and bequeathed to the defendant Morning View Cemetery Association.

The part of the will providing for the disposition of the residue and remainder of the estate is as follows: "I do hereby give, devise and bequeath unto the Morning View Cemetery Association of Wallace, Lincoln County, Nebraska, all the rest, residue and remainder of my estate of whatsoever description and wheresoever found, both real estate, personal property and mixed property. This gift and bequest is in fee simple forever except that it is subject to the provisions of my Will as hereinbefore set forth and subject to the payment of all the bequests and devises and payment of costs, taxes and expenses as hereinbefore mentioned, and shall consist of whatever is left after all of the above have been satisfied and paid in full." The estimated value of the estate given by the will to the cemetery association was from $260,000 to $270,000.

At the time of the trial there were 5 acres of land in the cemetery. It is located 45 miles southwest from North Platte, Nebraska, 24 miles south of U. S. Highway No. 30, and 2 miles from the village of Wallace. Its existence extends back to 1892. There have been about 87 burials in the cemetery in the past 10 years. A large number of lots are available for sale and use. The popu-

lation of Wallace was, at the time of the trial, about 293, and of the surrounding election precinct about 547. The area for local service extends into two or three adjacent counties. The amount expended for care and upkeep has been but a few hundred dollars a year. Members of the association, however, have contributed other service without compensation. Much more of detail is contained in the bill of exceptions, but this, it is believed, is sufficient to present the general aspect of the area and the basis of the problem presented. This is the purpose of these descriptive features.

By the action here the plaintiffs do not urge that a devise or bequest of the character described is invalid and in consequence should be vacated and set aside entirely. The theory of their pleaded action is to the contrary. They declare that this devise and bequest is valid to the extent of about $25,000.

The action here is to have the court declare the devise and bequest invalid and unlawful on the ground that it exceeds the amount necessary to effect the purposes and perform the services committed to the Morning View Cemetery Association under the statutes enacted for the creation, control, and operation of this and like cemetery associations.

The transcript of the record which came from the district court contains a number of subjects presented there but the basic question on appeal here is limited to that of whether or not the Morning View Cemetery Association, which will be referred to hereinafter as the association, could under law receive and retain the entire bequest and devise given to it by the will.

This question depends in part on the interpretation and application of certain statutory provisions, the pertinent essence of which will follow. It is pointed out here that the validity of none of these provisions is under attack in this case.

Section 12-501, R. R. S. 1943, contains the provisions under which the association was established and under

which it operates and designates the officers. Section 12-502, R. R. S. 1943, contains directions as to the details of organization and the recording of the creation and original legal record of such organizations.

Section 12-506, R. R. S. 1943, provides in part: "Such association shall have the power to purchase or take by gift, devise, * * * and to hold lands, not exceeding three hundred and sixty acres, and improvements thereon, exempt from taxation, execution, or from any appropriation of public purchasers, if the same are used exclusively for cemetery purposes and in nowise with a view to profit. After such land is paid for, all the future receipts and income of such association, whether from the sale of lots, from donations, or otherwise, shall be applied exclusively to laying out, protecting, preserving, and embellishing the cemetery and the avenues leading thereto, to the erection of such building or buildings, vault or vaults, chapel, crematory, mausoleum, and other structures as may be deemed necessary for the cemetery purposes, and to paying the necessary expenses of the association." There is no provision in this section which forbids or prohibits a devise of land to a cemetery association in excess of 360 acres for the purposes of the association. The exemption simply does not apply to the excess over 360 acres.

Section 12-507, R. R. S. 1943, provides: "No debts shall be contracted in anticipation of future receipts except for purchasing, laying out, enclosing and embellishing the grounds and avenues, and erecting buildings, vaults, a chapel, a crematory, a mausoleum and other structures, for which a debt or debts may be contracted, not exceeding eighty-five thousand dollars in the aggregate, to be paid out of future receipts."

Section 12-509, R. R. S. 1943, provides: "Such association shall have the power to establish a fund to be known as the perpetual care fund, placing therein such money as it may from time to time determine, out of its general funds; and it shall have the authority to receive gifts or

bequests of money and other personal property, and devises of real estate and interests therein, to be placed in the perpetual care fund. The principal of the perpetual care fund shall be forever held inviolate as a perpetual trust by said association, and shall be maintained separate and distinct from any other funds. * * * the income earned therefrom shall be used solely for the general care, maintenance and embellishment of the cemetery, and shall be applied in such manner as the association may from time to time determine to be for the best interest of the cemetery."

Sections 12-510 and 12-511, R. R. S. 1943, deal with the subject of specific gifts for special purposes which is of no concern here since the bequest and devise has no relation to the subject of special gifts for particular purposes.

Section 12-518, R. R. S. 1943, contains the following with relation to power: "It shall have power to enclose, improve and adorn the grounds and avenues, and erect buildings for the use of the association; * * *."

It appears proper to indicate here the correct legal characterization of this legacy. From the language of the act of which the foregoing cited provisions are a part the reasonable conclusion is that it is a charitable gift to the association. Section 12-511, R. R. S. 1943, while not declaring this specifically, does declare that gifts for specific purposes, which include all of the generally described functions of such an association as this in the receipt and disposition of money and property received, are classed as charitable and benevolent.

Also, in Rohlff v. German Old People's Home, 143 Neb. 636, 10 N. W. 2d 686, wherein the subject has received exhaustive consideration, it is pointed out that a gift such as this is a gift to a charitable corporation.

In the case of In re Estate of Harrington, 151 Neb. 81, 36 N. W. 2d 577, it was said: "A bequest to a charitable corporation by name, without further restriction or limitation as to use, is in fact not a bequest to the

corporation as such, but to the objects and purposes for which such corporation was organized."

In Allebach v. City of Friend, 118 Neb. 781, 226 N. W. 440, attention has been called to definitions of charity with a conclusion that a legacy such as this is a charitable trust. It must be said therefore that involved here is a charitable gift or legacy.

Returning now to the matter of the right of the plaintiffs to maintain the action, it must be said that they did and do have such a right. The language of the provision of the will makes this clear. It is made clear that no general charitable intent was expressed, and no such intent is inferable, that is, the charitable intent involved extended only to the purposes of the association. The declaration was that this gift was for a particular charitable purpose. In such instance, if the charitable purpose failed the estate would revert to the heirs. In such instance, the heirs would have the right to maintain action to recover the property. See, Rohlff v. German Old People's Home, *supra;* Allebach v. City of Friend, *supra.*

A legacy such as is involved here is a valid disposition of an estate under a will. In Tetschner v. Cram, 157 Neb. 734, 61 N. W. 2d 378, this court said: "A cemetery association organized under Chapter 16, section 45, Comp. St. 1893, is authorized to create a perpetual care fund and to receive property as trustee for the purpose of providing for the care of burial lots, graves, and the like, under sections 12-509 to 12-512, R. S. 1943.

"A bequest of the property of a testator to an existing cemetery association, directing that it be used for the purpose of maintaining its cemetery in proper condition * * * constitutes a valid bequest in trust for the purposes indicated as authorized by section 12-510, R. S. 1943." These statutory sections have the same numerical designation in the 1962 Reissue of Volume I, Revised Statutes of Nebraska, 1943.

The remaining question is that of whether or not

some condition existed at the time of the death of Maria Hughes or came into being thereafter which invalidated the gift in whole or in part. The plaintiffs predicated the action here on the theory that such a condition did at the time and does exist. That theory is that the gift made by the will exceeds the amount reasonably needed to meet the purpose of the gift, and thus is in violation of public policy, and on this account may not be enforced regardless of the desires or intentions of the testatrix.

Obviously the district court accepted this viewpoint and rendered its judgment accordingly, except that it allocated to the purpose of the legacy $35,000, or $10,000 more than the plaintiffs by their petition indicated as a sufficient and necessary amount.

Certain principles have been declared in decisions of this court which have application in the interpretation of the statutory provisions to which reference has been made here. In Benge v. Sutton, 169 Neb. 769, 100 N. W. 2d 857, it was said: "No right of a citizen is more valued than the power to dispose of his property by will. The right is in no manner based upon its judicious exercise." See, also, Reynolds v. Knott, 164 Neb. 365, 82 N. W. 2d 568.

In the case of St. James Orphan Asylum v. Shelby, 60 Neb. 796, 84 N. W. 273, 83 Am. S. R. 553, it was said: "The provisions of a will, like all other contracts, must be construed with a view of carrying out the intention of a testator, and unless there is something in it contrary to the law of the state, or in contravention of public policy, it will not be declared invalid." See, also, Brooks v. Kimball County, 127 Neb. 645, 256 N. W. 501; In re Estate of Vohland, 135 Neb. 77, 280 N. W. 241.

In Reed v. Ringsby, 156 Neb. 33, 54 N. W. 2d 318, it was said: "In the matter of control of discretionary powers of a trustee, the real question is whether it appears that the trustee is acting in that state of mind

in which it was contemplated by the settlor that he should act."

From what is said in the statutory provisions referred to and the cases cited it may not well be said that the gift here is violative of public policy. It is not contrary to any statute, and as to character or quality it is not forbidden by any recognized legal or equitable principle. The only question for determination therefore is that of whether or not on the facts and the controlling principles it may be regarded as excessive for the purpose or purposes intended by the testatrix, and if so, the extent of the excess.

Examination discloses that the gift was, by the terms of the will, for the general purposes of the association and not for any specific or defined cemetery purpose. From this and what has been pointed out it was properly for use in the performance of the lawful purposes and functions of the association. The uses are by virtue of statute determinable by designated representatives of the association. One of the named purposes was to have a general fund, and it appears reasonable to say that a legacy such as this would become a part of the general fund of the association.

Powers of an association such as this include the right to acquire land for cemetery purposes; to apply receipts, income from donations, or otherwise, to laying out, protecting, preserving, and embellishing the cemetery and avenues leading thereto; to erect buildings, vaults, a crematory, a mausoleum, and other structures deemed necessary; to pay necessary expenses; to contract debts in the anticipation of receipts up to $85,000; and to establish a perpetual care fund from gifts and bequests for that purpose and out of the general fund.

The parties are in accord that the value of the estate which would pass to the association by this will would be from about $260,000 to $270,000. The effect of the judgment is that any amount over $35,000 was excessive and that the balance should be and become the property

of the plaintiffs, this amount being all that could be regarded as reasonably necessary for compliance with the purpose and intent of Maria Hughes.

On the record in this case it cannot be ascertained with any degree of accuracy what, if any, excess there will be over the reasonable requirements of this association in the performance of its projected purposes and functions, especially in the light of the intent of the testatrix which has become manifest by the terms of the will.

The record discloses that the total of expenditures for the association for the years 1955 to 1961 inclusive, which included $300 for land acquired, was $2,881.83. In addition to this some members did work on the premises for which they received no pay. It is of course true that this should not be regarded as a measure for guidance for the future by the association in the performance of the functions conferred upon it by statute. It is reasonably inferable that this represented only the current availability of funds.

In arriving at a conclusion as to whether or not this legacy could be applied to the purposes of the association it appears proper to consider elements definitive of the present and the future contemplated purposes.

The association was organized in 1892. There are more than 500 lots in the cemetery. The lots are designed to contain multiple graves. At least 327 lots have been sold. There are approximately 616 marked graves and many which are not marked. About 20 percent of the graves are of residents of Wallace, Nebraska; 30 percent are from elsewhere in Lincoln County, Nebraska; and the balance came from Perkins, Hayes, Gage, and Webster Counties, Nebraska, and from Colorado, California, and Oregon. About 35 relatives of Maria Hughes were buried there.

The record discloses that the association has in prospect the following improvements with their estimated costs: Seeding, $7,786.88; removal of trees, $1,250; equipment, $781; fence, $2,999.50; well, $1,067.50; irriga-

tion well, pump, and motor, $5,317; sprinkler system, $5,721.50; paving, including two new driveways, $28,965; landscaping, $9,244.90; gates, $885; building, $17,600; retaining wall, $14,181; flagpole, $96; furniture and fixtures, $1,610; and memorial, $4,800; all for a total of $102,305.28. These amounts are the result of estimates contained in the record which may depart from accuracy, but it cannot be said that there is a sufficient departure to be of significance here.

The right and power to make expenditures of funds for these purposes is inferable from the language of sections of statute already referred to herein, and it is made definite by the following which is contained in section 12-518, R. R. S. 1943: "It shall have power to enclose, improve and adorn the grounds and avenues, and erect buildings for the use of the association; * * *."

It is to be observed, as has been indicated, that the association is empowered to pledge the credit of the association for its purposes up to $85,000.

It is to be observed further that no estimate of current and continuing cost of operation, further extension of area, and possibly needed additional facilities appears in this, and also in this is not included any item for perpetual care.

It is not suggested that improvements of the character named would not be desirable, but only that there is a lack of necessity therefor and that the estimated cost is excessive.

The substance of the insistence of the plaintiffs is that in the light of the existing conditions, the manner of operation up to the date of the death of Maria Hughes, and the environmental situation, the approval of this legacy cannot be justified beyond the amount of $35,000.

This insistence cannot be accepted as controlling. In the light of the statutes and other authorities cited herein, Maria Hughes had the lawful right to make her will to the extent involved here and to dispose of the estate involved as she did for the purpose indicated. The as-

sociation thereafter by and through its representatives had the discretion to allocate it as it chose and shall choose to the statutorily declared purposes. The amount to which a purpose has been indicated far exceeds the amount which was allocated to the association by the judgment of the district court. There are other purposes to which allocation by the association may be made which are not determined and are not capable of determination. There is nothing of an evidentiary character upon which to base a reasonable conclusion that all of this legacy may not properly and within the meaning of law and equity be used conformable to the intent of the testatrix and the proper powers of the association.

The intent of Maria Hughes by her will obviously was to transform this from just a burying ground, and to create in this community for the years to come a place of serene beauty and utility with funds to keep it lastingly so as a resting place for relatives and friends already departed and others who would follow. This intent cannot and should not be defeated or denied on the basis of a mere showing of earlier years of meager expenses of acquisition, maintenance, and operation.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. DUANE D. WITMER, APPELLANT.
118 N. W. 2d 510

Filed December 7, 1962. No. 35283.

1. **Incest.** In a prosecution for the crime of incest the testimony of the prosecutrix must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction.
2. ———. The unsupported testimony of a prosecutrix in an

incest case, that frequent acts of sexual intercourse with defendant occurred prior to the commission of the act informed against, is not corroborative of her testimony as to the commission of the offense charged.

3. **Criminal Law: Evidence.** When the law requires the corroboration of a witness, the testimony of such witness must be supported by other evidence than that of the witness herself.
4. **Incest.** Where a previous act of sexual intercourse is relied upon as the sole corroboration of the prosecutrix in a prosecution for incest, the evidence of prosecutrix as to such previous act must be corroborated.
5. **Witnesses.** Where a witness is called for the purpose of impeaching a witness on the trial, the evidence of such witness is not admissible unless a foundation for such impeachment has been laid by calling the attention of the witness to be impeached to the alleged inconsistent acts or statements, and giving him an opportunity to state whether or not he performed such acts or made such statements.
6. ———. The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded with directions to dismiss.

Mitchell & Taylor, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

The defendant was convicted in the district court for Hall County for having committed the crime of incest upon his 17-year-old daughter, Judith Witmer, on September 22, 1961, and has been sentenced to serve a term of 20 years in the State Penitentiary. He has brought the case to this court for review.

Judith Witmer, the prosecuting witness, was born on September 7, 1944, and at the time of the commission of

the act charged was 17 years of age. She testified that on September 22, 1961, she was living with her father, mother, and brother at a natural gas compressor station located 6 or 7 miles northeast of Grand Island, Nebraska, in Merrick County. Her father was the supervisor of the compressor station, her mother worked as a cosmetologist in Grand Island, and her brother worked at the Grand Island Ordnance Plant. The family lived at the compressor station in a home provided by the gas company, which they had occupied for more than 10 years.

On the day in question the defendant, Judith, and her brother, David, ate their evening meal at home. Her mother was working and was not present. After the evening meal David left in his automobile on business of his own. Judith testified that shortly thereafter she and defendant went for a ride in defendant's automobile, the father doing the driving. He proceeded to Eagles Lake near Grand Island in Hall County and there had sexual intercourse with Judith in the back seat of the automobile. Thereafter, about 8:45 p. m., they drove around for 15 or 20 minutes in Grand Island. They passed the beauty shop where her mother worked, waved to her when they saw her standing on the sidewalk in front of the shop, and went on to Frontier Village. There the defendant had two beers and Judith had two bottles of pop, after which they went home. The mother was at home when they arrived. Judith made no complaint to her mother.

Judith testified to a series of acts of sexual intercourse with her father, commencing in May 1959, none of which was alleged to have occurred in Hall County. In Schrum v. State, 108 Neb. 186, 187 N. W. 801, this court stated: "There can be no doubt that proof of facts and circumstances tending to show other acts of intercourse about the time charged in the information is properly admissible in cases of this nature. Leedom v. State, 81 Neb. 585; Woodruff v. State, 72 Neb. 815. This evidence, in order to be corroborative in character, should proceed from other

sources than from the prosecutrix alone. If a witness testifies that criminal intercourse was had upon one day, the fact that she testifies that a like act was had upon another occasion does not corroborate her testimony. Boling v. State, 91 Neb. 599 * * *. The court instructed the jury that the prosecuting witness could not corroborate herself by statements of other acts, and thus the interests of the defendant were protected." See, also, Gammel v. State, on rehearing, 101 Neb. 538, 166 N. W. 250; Fitzgerald v. State, 78 Neb. 1, 110 N. W. 676.

The State asserts that the previous uncorroborated acts of sexual intercourse testified to by a prosecuting witness are sufficient corroboration of the specific act charged to sustain a conviction. The cases of Smothers v. State, 81 Neb. 426, 116 N. W. 152, Woodruff v. State, 72 Neb. 815, 101 N. W. 1114, and State v. Way, 5 Neb. 283, are cited in support of this assertion. The previous acts of sexual intercourse are admissible to show the lustful inclination or disposition of the defendant to commit such acts upon his daughter, and to that extent they may be considered to be corroborative. But such uncorroborated acts testified to by the prosecutrix are not sufficient to sustain a conviction for the offense charged. A prosecutrix cannot by her unsupported testimony corroborate herself. When the law requires the corroboration of a witness, it must be accompanied by other evidence than that of the witness herself. Mott v. State, 83 Neb. 226, 119 N. W. 461.

In a prosecution for incest the evidence of the prosecutrix need not necessarily be corroborated by an eyewitness to the particular act, but it is necessary that she should be corroborated as to the material facts and circumstances which tend to support her testimony and to establish the truth thereof. Such corroboration may be either by direct testimony or by circumstantial evidence. Toth v. State, 141 Neb. 448, 3 N. W. 2d 899; Bridges v. State, 80 Neb. 91, 113 N. W. 1048.

There is no corroboration of the specific offense

charged in Hall County other than the contention of the State that a previous act of sexual intercourse testified to by Judith as having occurred in Merrick County was sufficiently corroborated so as to adequately make it corroborative of the offense charged in the information. This requires a consideration of the facts of the previous act relied upon.

Judith testified that in May 1959, she was working at the family home near the compressor station when her father came home about 2 p. m. She said her father, after a 2-hour struggle, had sexual intercourse with her. During the course of the struggle she ran into the kitchen, picked up a knife, and attempted to use it on him. He took the knife away from her and continued his lustful actions until she gave up and submitted. After the sexual act was completed she dressed, ran to the compressor station office, and asked John Brunken, an employee of the gas company, to help her. She testified as follows: "I told John he had to help me; that fathers just don't do those kind of things to their daughters." When she saw her father coming to the office she ran out the back door. When he went out to find her she came back into the office and hid in a restroom. Her father returned to the office, took her from the restroom, and took her back to the house. Brunken testified as follows: "As near as I can remember, she said my dad done something awful to me. And that she said fathers just don't do that to their daughters, do they? I said, No, I don't suppose they do. She said, I tried to stick a knife in him but he got it away from me. She said, You've got to help me. I told her to call her mother and have her come home." Brunken further testified that Judith called her mother and that he went toward the house when he met the defendant. He asked what was going on and defendant replied that he had mentioned something about sex to Judy and she ran out of the building. He corroborated Judith's testimony about her leaving the office, her return, and defendant

taking her from the restroom and telling her to go home. Another employee, Gordon Backer, testified that he came to the office to work the 4 p. m. shift, that Judith was standing in the office crying, that she ran out the back door when her father came in, that she came back and went into the restroom, and that defendant came in, pulled her from the restroom, and told her to go home and finish the housework.

With reference to this event the defendant testified substantially as follows: He denies that he had sexual intercourse with Judith at this time or at any other time. He says that he came home on the day of the incident and took an afternoon nap. When he awoke Judith was doing some ironing in the kitchen. She called him to the kitchen and told him she had a date that evening. She had been on a date the night before. She was then in junior high school and 14 years of age. Defendant insisted on knowing who the boy was and on discovery that he was a senior in high school and 3 or 4 years older than Judith, he told her she could not go. She became angry and during the argument she drew a knife on him which he forcibly took from her. She ran out of the house. He later followed her out and met Brunken coming toward the house. He walked back to the office with Brunken, who asked him what was the matter with Judy. He told Brunken about Judith wanting to go out with older boys all the time and that she had drawn a knife in the course of the ensuing argument. He said that his wife came home in about 15 minutes. She talked with Judith, who had returned to her ironing. His wife said nothing to him about the incident. The wife testified that Judith said nothing to her indicating the commission of an incestuous act by the defendant. She observed nothing unusual about the home. She said that Judith complained about being scolded by her father. She was not crying. No mention was made of the knife. Her hair and clothes were not rumpled. She did not appear to be emotionally upset.

The evidence of the May 1959 incident, if it is sufficient to corroborate the charge in the instant case, must be of such a character as would support a conviction for incest for the alleged act of sexual intercourse occurring in May 1959. We point out that the corroborative evidence of the May 1959 incident is indefinite and uncertain as to the conduct referred to by Judith when she complained to Brunken and Backer. The nature of the act purporting to have been corroborated was left to speculation and conjecture, which will not support a verdict of guilty. Neither of these two witnesses reported the incident to anyone. Judith's complaints were consistent with the story told by the defendant. It could be that the story told by Judith was an expression of resentment against her father for his refusal to permit her to date with older boys. The alleged corroborative evidence does not sufficiently point to the crime of incest to the exclusion of other conduct of defendant which the prosecutrix may have resented. Judith alleges that defendant had frequent acts of sexual intercourse with her for 3 or 4 years and admits that she complained to no one, not even to her mother.

The crime charged against the defendant, if true, indicates complete moral depravity. It offends the moral senses of the public from which juries are drawn and tends to create sympathy for a young girl alleging a grievance of this magnitude against her own father. The penalty for such a crime is commensurate with the nature of the crime and, if the crime be established, a severe penalty is required to be assessed. But a defendant cannot be properly convicted on the evidence of the prosecutrix alone. There must be corroborative evidence pointing to the guilt of the defendant of the specific crime charged. In the absence of sufficient corroborating evidence, the protection of the innocent demands that the prosecution must fail for want of competent proof. We find the evidence of corroboration

to be insufficient to sustain a finding of guilt by a jury beyond a reasonable doubt.

There is testimony in the record which, if competent and properly admitted, would lead a jury to the verdict it reached. We shall present the situation and point out the reasons why it does not support the verdict.

The State called Ruth Witmer, the wife of the defendant and the mother of Judith, as a witness. She testified in support of defendant's contentions, denying all the assertions of Judith that she had knowledge of incidents tending to sustain Judith's testimony. The county attorney requested the court for permission to treat Mrs. Witmer as a hostile witness. The request was granted. The interrogation of Mrs. Witmer continued. No attempt was made to lay a foundation for her impeachment. In rebuttal, the State thereafter called many witnesses who testified to statements made by Mrs. Witmer which were contrary to the testimony she gave on the witness stand. Among these witnesses was the court reporter who took statements made by Mrs. Witmer when she was interrogated by the county attorney in his office on September 25, 1961. This evidence was erroneously admitted for the reason that no foundation had been laid for its admission during the course of Mrs. Witmer's examination as a hostile witness. In Omaha St. Ry. Co. v. Boesen, 74 Neb. 764, 105 N. W. 303, 4 L. R. A. N. S. 122, this court said: "For the purpose of impeachment, the defendant offered certain portions of the evidence of the same witness given at the first trial. The offer was rejected, and its rejection is now assigned as error. It does not appear that any attempt was made at the second trial to lay a foundation for the impeachment of the witness by calling his attention to the alleged inconsistent statements, or otherwise. The evidence offered was not, under the circumstances, admissible for the purpose of impeachment."

The improper evidence tended strongly to destroy

the credibility of Mrs. Witmer and to indicate that the defendant was guilty of other criminal acts. Even if Mrs. Witmer had been properly impeached, the only legal effect that could have resulted was a finding that she was not worthy of belief. Such impeaching evidence, even when it is properly admitted, is not competent as substantive evidence of the facts to which such statements relate. In a similar situation, this court said: "If this line of evidence was properly received, a question which the record before us does not impose upon us the duty of determining, still its effectiveness and probative force is limited solely to the credibility of Degele. 'Evidence of such contradictory statements is admitted only to discredit the witness; it is not affirmative evidence of the facts stated.'" State ex rel. Nebraska State Bar Assn. v. Bachelor, 139 Neb. 253, 297 N. W. 138. See, also, 3 Jones, Evidence, Civil Cases (4th ed.) 1591, quoted with approval in State ex rel. Nebraska State Bar Assn. v. Bachelor, *supra*.

We hold that the offense charged is not supported by sufficient corroborative evidence to sustain a conviction. Defendant's motion to dismiss made at the close of all the evidence should have been sustained. The judgment of the district court is reversed and the cause remanded to the district court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. JOHN BURTON, APPELLANT.
118 N. W. 2d 502

Filed December 7, 1962. No. 35305.

1. **Criminal Law.** It is only where there is in fact no preliminary examination upon a criminal charge, either in form or substance, that a plea in abatement may successfully be directed to the sufficiency of such hearing.

2. ———. A bill of exceptions, preserving the evidence introduced on the hearing of issues of fact formed by a plea in abatement in a criminal case and the State's answer thereto, is a prerequisite to a review of the action of the trial court in overruling such plea.
3. ———. In a prosecution for fondling or massaging in an indecent manner the sexual organs of a girl under 16 years of age, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
4. ———. It is only when there is a total failure of proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.
5. ———. In a criminal action the Supreme Court will not interfere with a verdict of guilty based on conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.
6. **Trial.** Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism.
7. **Criminal Law.** Harmless error in a criminal prosecution is not a ground for the reversal of a conviction.
8. **Criminal Law: Witnesses.** A trial court in a criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness leading questions. The discretion is a legal one and subject to proper limitations.
9. ———: ———. Held, in the case at bar, that no error was committed in allowing questions of a leading character to be asked, of which complaint is made.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Straight Townsend, Holtorf, Hansen & Fitzke, and Alfred J. Kortum, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The plaintiff in error, subsequently referred to as defendant, was charged with the crime of indecent fondling of a minor. In that connection, the alleged offense is defined by section 28-929, subdivision (2), R. S. Supp., 1961. Trial was had to a jury. The jury returned a verdict finding the defendant guilty as charged. The defendant filed a motion for a new trial which was overruled. Thereafter the defendant was sentenced to be confined in the Nebraska State Penitentiary for a period of 2 years at hard labor, Sundays and holidays excepted. Defendant seeks a review in this court.

The defendant contends that the trial court erred in overruling the defendant's plea in abatement, and that the defendant's constitutional rights were violated in that the defendant was tried in the district court for Scotts Bluff County without first having had a preliminary hearing as required by law.

The defendant filed a plea in abatement in the district court for Scotts Bluff County. The basis of the plea was that the evidence was insufficient to show that an offense had been committed and that the defendant probably committed it. Attached to the plea in abatement is a transcript of the evidence adduced at the preliminary hearing in the county court of Scotts Bluff County.

The State of Nebraska filed an answer to the plea in abatement denying all the allegations therein contained.

The defendant's plea in abatement was overruled by the trial court.

The evidence taken at the preliminary hearing, attached to the plea in abatement and which is a part of the transcript, was not offered as a part of the evidence

when the plea in abatement was argued and is not contained in the bill of exceptions.

In Lingo v. Hann, 161 Neb. 67, 71 N. W. 2d 716, it was said: "The functional purpose of the preliminary hearing is stated in section 29-506, R. R. S. 1943, as follows: 'If upon the whole examination * * * it shall appear that an offense has been committed and there is probable cause to believe that the person charged has committed the offense, the accused shall be committed to the jail of the county in which the same is to be tried, there to remain until he is discharged by due course of law; * * *.'

" 'It is in no sense a trial of the person accused. Its purpose is to ascertain whether or not a crime has been committed, and whether or not there is probable cause to believe the accused committed it.' Roberts v. State (145 Neb. 658, 17 N. W. 2d 666) supra.

"The effect of the foregoing, if found to exist, is to hold the accused for trial in the district court, which has jurisdiction to try him. See Dobrusky v. State, 140 Neb. 360, 299 N. W. 539." That is what the county court of Scotts Bluff County did. See, also, Cotner v. Solomon, 163 Neb. 619, 80 N. W. 2d 587; Birdsley v. Kelley, 159 Neb. 74, 65 N. W. 2d 328.

In Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357, this court said: "When the sufficiency of a preliminary hearing is called in question by a plea in abatement, 'the only question to be considered is with reference to the powers of the magistrate which are called into action in the determination of what shall be the result of such hearing. If he is compelled to act judicially, and to determine as a judicial question the matters over which he has jurisdiction, and does determine such questions upon competent evidence, then an error in judgment as to the result reached can not be determined by a plea in abatement. It is only where there is in fact no preliminary examination, either in form or sub-

stance, that advantage can be taken of by such a plea.' Jahnke v. State, 68 Neb. 154, 94 N. W. 158."

In Bradehorst v. State, 168 Neb. 203, 95 N. W. 2d 495, this court said: "This court has consistently held that, to review a decision of the trial court on error proceedings in a criminal case on a question of fact, it is essential that such evidence be preserved in a proper bill of exceptions. The evidence introduced on the hearing of issues of fact formed by a plea in abatement in a criminal case and the State's answer thereto cannot be reviewed here unless preserved in a bill of exceptions. Burnham v. State, 127 Neb. 370, 255 N. W. 48."

In Burnham v. State, 127 Neb. 370, 255 N. W. 48, this court said: "* * * the evidence adduced by the parties and considered by the court, in determining issues presented by the plea in abatement and the answer thereto, is not preserved in the bill of exceptions. * * * To review a decision of the trial court upon appeal in a criminal case upon a question of fact, where evidence was submitted and considered, it is essential that such evidence be preserved in a proper bill of exceptions, * * *."

In the light of the foregoing authorities, the above assignments of error set forth by the defendant cannot be sustained.

The defendant contends that the evidence was not sufficient to sustain the verdict, and is contrary to law. This requires a review of the evidence.

The chief of police of Mitchell located the Nile Theater in Mitchell and testified generally to its interior and exterior.

Shirley Cline testified that she lives in Mitchell and is in the fifth grade; that she remembered Monday, August 21, 1961; that on that day she saw the defendant in the theater; that prior to that she and Victoria Brunz had been swimming; and that after swimming, the two girls went into the theater and saw the defendant sitting at his desk in the candy shop. She talked to the defendant, and they stayed in the candy shop 15 or 20

minutes after which she, Victoria, and the defendant, went upstairs into the balcony of the theater and into the projection room. She further testified that it was completely dark in the theater, but they could see each other; that there were lights on in the projection room; that all three of them were in the projection room and were standing up; and that the defendant sat down in a chair. This witness further testified that she was dressed in a pair of jeans and a blouse, and Victoria was dressed in like manner; that Victoria pulled down her jeans, and the defendant opened his jeans; that the defendant touched Victoria around the waist first, and touched her between the legs more than once with his hand; and that Victoria had removed her clothing and was in front of the defendant when he touched her. After the defendant stopped touching Victoria she pulled up her jeans and walked over and stood against the wall. It was getting late in the afternoon and Victoria and Shirley decided to go home. When they left the projection room, the defendant had his pants zipped, but they had been unzipped before.

On cross-examination Shirley testified that the defendant asked Shirley and Victoria to go upstairs; that they were upstairs in the projection room about 20 minutes; and that while Victoria was standing against the wall she took down her jeans and her panties and walked over to the defendant. On re-direct examination Shirley testified that when she and Victoria were ready to leave the theater the defendant gave her some candy.

Victoria Brunz testified that she lived in Mitchell; that she was in the fourth grade; and that she was 10 years old at the time of trial. She further testified that she saw the defendant in the Nile Theater the afternoon of August 21, 1961; that after leaving the swimming pool she and Shirley went to the Nile Theater; that when they got to the theater they went up into the balcony; that she and Shirley took off the clothes

they were wearing; and that at the time the defendant was sitting in a chair. She further testified that the defendant made the girls go by him; that the defendant touched her between her legs with his hand more than once; that the defendant put his hand on her sexual organs; that Shirley watched; that she was in the balcony undressed with the defendant about 15 minutes; that the defendant did the same thing to Shirley as he did to this witness; that after they put on their clothes, they went to the candy shop and the defendant gave them money; that he sometimes gave them 50 cents and sometimes a dollar; that on that day he gave them both 50 cents; and that they left the theater by the back door and went home. Before they left the theater the defendant told them that if anyone saw them they would get into trouble. Victoria further testified that she was afraid to tell what happened, and that the defendant told them not to tell their mothers, and that they had to go home.

Jacqueline Brunz, the mother of Victoria Brunz, called by the defendant, testified that she made a complaint in this matter to the county authorities; that the matter first came to her attention when one of the other children told her Victoria had some money that the defendant had given her; that she questioned Victoria and Victoria told her what had happened; that she made complaint to the chief of police; and that she had a conversation relating to this matter on August 22, 1961, with Victoria in their home, when Victoria told her what had happened the previous day, which would be August 21, 1961. Victoria told her mother that she took off her clothes, as the defendant told her to do so. On cross-examination this witness testified that Victoria told her that the defendant touched her, "messed with her body," and patted her.

A salesman for a radio station testified that he usually called on the defendant at Mitchell on Monday. He could not testify as to whether or not he saw the defend-

ant on Monday, August 21, 1961. He did receive a check from the defendant on August 22, 1961.

The chief of police of Mitchell testified for the defense that he received a complaint on August 22, 1961, from Mrs. Brunz; that he contacted the county attorney on August 23, 1961; and that there was a conference on August 26, 1961, with the county attorney, Mrs. Brunz, the two girls, and this witness present. The county attorney questioned the girls, and they told him what happened on Monday afternoon, August 21, 1961.

On cross-examination this witness testified that the girls told the county attorney that they went into the theater, went upstairs with the defendant to the projection room where they undressed, and the defendant played with them with his hands on their private parts. The girls redressed and left the theater. The girls also said that at that time the defendant had his pants unzipped, and that this had happened more than once. The girls made a statement that they received a small sum of money and some candy or a drink; and that the defendant had asked them to undress.

The defendant testified that he was a theater manager for the Midwest Amusement Company for 16 years and thereafter in business for himself; that he had resided in the community for 20 years; that he lived in a house in Scottsbluff; and that his daughter and her husband lived in the main part of the house and he and his wife lived in the basement apartment. He further testified that the operation of the theater is in the evening, and there is necessary paper work to be done during the daytime; that the Sunday operation of the theater is continuous from 1 p.m., until closing time; that his wife, Marguerite, helps him; that she works the floor of the theater and he works the projection room; that his wife also works at the Standard Hardware Company in Scottsbluff; that he usually spends from 10 o'clock in the morning until approximately 4 o'clock in the afternoon, either at his desk, doing seat repair, advertising,

carpet repair, or projector repair work; and that he usually drove back to Scottsbluff at 4 p.m., to pick up his wife at 5:30, and they got back to Mitchell at 6:30 or quarter until 7 p.m. He further testified that he was not in the theater on August 21, 1961, due to having trouble with a stomach ulcer that weekend; that on August 21, 1961, he was in bed, and had been in bed most of that day because of his physical condition; that his wife went to work at 9 a.m., came home at 11:30 a.m., went back to work at 12:30 p.m., and came home at 5:30 p.m.; that when she came home he was sitting in a chair with his robe and slippers on; that he then got dressed and he and his wife drove to Mitchell, arriving there at approximately 10 minutes until 7 p.m.; that he did not see Shirley Cline or Victoria Brunz that day; that during the years he has been operating the theater he has become acquainted with the two girls and other children in the Mitchell community; that with reference to his relationship with these two particular girls, they would come in, visit and talk, and want treats or something like that, and he usually gave them a candy bar or a coke; that he never molested Victoria Brunz in any way; that the previous week Shirley Cline and Victoria Brunz came into the theater at about 3 or 4 p.m., and asked the defendant what he was doing and he told them, then they asked him for a coke which the defendant refused to give them; that the girls had on little dresses; and that they pulled their dresses up, and the defendant told them they had better get home or he would call their mothers. The defendant further testified that his daughter visited him at 2 o'clock the afternoon of August 21, 1961.

A neighbor of the defendant who lived north of the defendant's residence testified that August 21, 1961, was the first day of his vacation. He was unable to say whether he saw the defendant's car parked in front of the defendant's house on that day.

The defendant's wife corroborated the defendant's

testimony with reference to his illness on August 21, 1961, and that he was home all day, and further testified that she had a prescription filled at a drug store to be used by the defendant.

Defendant's daughter testified that she remembered August 21, 1961; that her parents went to Mitchell about 6 p.m., on that day; that her father's car was in front of the house all of that day; and that she saw her father in his home at about 2 o'clock that afternoon and he was in bed.

A police officer testified that on August 21, 1961, at approximately 4:30 or 5 p.m., he pulled up in front of the post office and saw the defendant sitting on the fender of his car in front of the theater in Mitchell; that he noticed two little girls along the side of the post office, between the post office and the Legion club; and that when the girls saw him they ducked to the back end of the building. On cross-examination this witness testified that to the best of his knowledge Shirley Cline and Victoria Brunz were the girls that he saw duck behind the post office building.

It was stipulated that the defendant appeared before the county court on August 29, 1961.

The defendant moved for dismissal of the case primarily because of the failure of proof on the part of the State to prove the crime charged, and if the court ruled adversely on that motion, the defendant moved to direct a verdict for the defendant for the same reason. The trial court overruled this motion.

This court has not heretofore, in a case of this kind, laid down a rule with reference to the evidence required to corroborate the prosecutrix. We believe that the rule announced in Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380, which is a case of assault with intent to commit rape, should be adopted. There are a number of cases in this jurisdiction setting forth the same rule. Therefore, we hold that in a prosecution for fondling or massaging in an indecent manner the sexual organs

of a girl under 16 years of age, it is not essential to a conviction that the prosecutrix should be corroborated by other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.

As to corroboration, the following additional principles are applicable.

"* * * corroboration may consist of the proof of such surrounding facts and circumstances as will support her testimony against the accused as to the principal fact, and will identify the accused as the party guilty of the crime. It may consist of circumstantial evidence. Nabower v. State, 105 Neb. 848; Kotouc v. State, 104 Neb. 580; Day v. State, 102 Neb. 707; Hammond v. State, 39 Neb. 252." Robbins v. State, 106 Neb. 423, 184 N. W. 53.

In the instant case, although the two young girls were reluctant to testify and confess to an immoral act on their part, their testimony was such, coupled with the testimony of other witnesses, as to show corroboration of the testimony of the prosecutrix. The defendant admitted to giving these young girls money to get rid of them. The record also discloses that the defense called the mother of the prosecutrix who was asked on direct examination about the conversation she had with her daughter, and the details of this conversation were brought out on cross-examination as heretofore set forth.

"This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Williams v. State, 115 Neb. 277, 212 N. W. 606. See, also, Haines v. State, 135 Neb. 433, 281 N. W. 860; Onstott v. State, *supra*.

"It is only when there is a total failure of proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty." Wanzer v. State, 41 Neb. 238, 59 N. W. 909. See, also, Onstott v. State, *supra;* State v. Wilson, *ante* p. 86, 115 N. W. 2d 794.

The defendant in his motion for new trial predicated error on the part of the trial court in refusing to give certain instructions requested by the defendant, and on certain instructions given by the trial court. The defendant, in argument to this court, apparently has abandoned this assignment of error. However, we have examined the instructions requested by the defendant and given by the trial court.

Some criticism was made of instruction No. 9 given by the trial court, which is the same instruction requested by defense counsel shown in requested instruction No. 8. The only difference is the substitution of the word "an" for the word "the," which does not in any manner change the subject matter contained in the instruction requested by the defendant.

"Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism." Brown v. Chicago, B. & Q. Ry. Co., 88 Neb. 604, 130 N. W. 265. See, also, Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170. This assignment of error is without merit.

The defendant has not specifically assigned as error, but has made objection to certain testimony and the disposition of it in his brief. This testimony consisted of a statement by a deputy sheriff of Scotts Bluff County that when he arrested the defendant he smelled "like an odor like you get off of a mental person." Objection was

made by the defense counsel who asked "that that be stricken as a conclusion of the witness and the jury admonished to disregard that." The court sustained the objection. The defendant asserts that a motion for mistrial would have been in order, but the defendant's request for admonishing the jury should have been allowed and followed. The defendant fails to point out in what manner this procedure was prejudicial to his defense. The rule in Jurgensen v. State, 135 Neb. 537, 283 N. W. 228, is applicable, which states that error may creep into the proceedings in a criminal prosecution in spite of impartiality, care, and vigilance of the trial judge. It is only error prejudicial to a right of accused or the denial of a substantial legal right that requires the reversal of his conviction. Harmless error does not require a second trial. The law recognizes the possibility of harmless imperfections in the proceedings of judicial tribunals and does not defeat itself by exacting absolute perfection in bringing malefactors to justice.

A statute relating to the review of criminal prosecutions reads in part as follows: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." § 29-2308, R. R. S. 1943.

The defendant's contention is without merit.

The defendant complains that the county attorney was allowed to ask leading questions of the two 9½-year-old girls here involved, and to repeat the questions in order to obtain a response from them as witnesses. As previously stated, these young girls were reluctant to confess that they had acted improperly. After repeated assurances of counsel and the court, the girls told their story in a rather realistic and clear manner.

The law recognizes that the trial court has wide discretion in this type of situation. The trial court permitted the asking of leading questions in the instant case to a limited degree. The following is applicable.

In Woodruff v. State, 72 Neb. 815, 101 N. W. 1114, the court said: "Some of these questions which were permitted to be asked and answered may have been, and probably were, in a measure, of a leading character, but regarding which we are satisfied no abuse of discretion was committed by the trial court in suffering the examination to be pursued in the manner in which it was. It is, say all the authorities, discretionary with the trial court in both civil and criminal cases to allow leading questions on the direct examination; the discretion, of course, being a legal one and subject to proper limitations. Stephen, Digest of the Law of Evidence, 445, and note; McKelvey, Evidence, sec. 237, and notes. In Edwards v. State, 69 Neb. 386, it is held that the trial court has a large, though not unlimited, discretion in granting or refusing permission to ask a witness leading questions. In support of the rule there is cited in the opinion, Schmelling v. State, 57 Neb. 562, and Welsh v. State, 60 Neb. 101."

The general rule is stated in 98 C. J. S., Witnesses, § 332, p. 46. This rule is to the effect that it is usual and proper for the court to permit leading questions in conducting the examination of a witness who is immature, unaccustomed to court proceedings, inexperienced, agitated, terrified, or embarrassed while on the stand, and lacking in comprehension of the questions asked.

We find no prejudicial error was committed by the trial court in respect to the matter complained of.

Other matters complained of by the defendant are without merit and need not be discussed.

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.

DOLORES LUCILLE WORKMAN ET AL., APPELLEES AND CROSS-APPELLANTS, V. CLARA D. WORKMAN, EXECUTRIX OF THE ESTATE OF LEWIS M. WORKMAN, DECEASED, ET AL., APPELLANTS AND CROSS-APPELLEES, IMPLEADED WITH FIRST CONTINENTAL NATIONAL BANK AND TRUST COMPANY, SUCCESSOR TO CONTINENTAL NATIONAL BANK, ET AL., APPELLEES AND CROSS-APPELLANTS.

118 N. W. 2d 764

Filed December 14, 1962. No. 35148.

1. **New Trial.** A motion for new trial which has been duly and timely filed may be heard at a subsequent term and the court may then pass upon the motion and enter its judgment on the motion for new trial.
2. **Trusts.** A suit for the establishment or enforcement of a constructive trust may be maintained by the person prejudiced or deprived of a benefit by the fraud, actual or constructive, which gives rise to the trust, or by the successors in interest of such person.
3. ———. All persons may join in a suit to establish and enforce a trust who have similar interests, arising out of the same trust, and who are seeking the same relief, although their interests are not joint.
4. **Actions: Trial.** A person who has an interest in the matter in litigation and in the success of either party to an action has a right to intervene in the litigation either before or after the issue has been joined and before the trial begins.
5. **Appeal and Error.** Before an error requires a reversal it must be determined that it was prejudicial to the rights of the party against whom it was made.
6. **Conspiracy.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object or a lawful object by unlawful or oppressive means.
7. ———. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury.
8. **Fraud: Equity.** Fraud cannot be presumed or inferred without proof in a court of equity any more than in a court of law. However, courts of equity do not restrict themselves by the same rigid rules as courts of law in the investigation of fraud and in the evidence and proofs required to establish it. How-

ever, the proof must be sufficient to satisfy the conscience of the court that fraud is really existent, and to do this, it must be sufficient to overcome the natural presumption, which is always of considerable force, that men are honest and act from correct motives.

9. Fraud. To prove fraud direct evidence is not always essential. Inferences or presumptions of fraud may be drawn from facts and circumstances. However, such inferences or presumptions must not be guess work or conjecture but must be rational and logical deductions from the facts and circumstances from which they are inferred.
10. ———. What constitutes fraud is a matter of fact in each case. Deception finds expression in such a variety of ways that courts have studiously avoided reducing its elements to positive definitions. Courts content themselves with determining from the facts in each case whether fraud does or does not exist, for whatever satisfies the mind and conscience that fraud has or has not been practiced is sufficient.
11. ———. In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.
12. Corporations. An officer or director of a corporation occupies a fiduciary relation to the corporation and to stockholders. He is treated by courts of equity as a trustee, and as such is ordinarily personally liable to beneficiaries of a fund for any misapplication of the fund to other beneficiaries not entitled thereto.
13. Contracts. Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself convincing evidence of fraud.
14. Interest. Where money or property belonging to another was not paid or turned over to the person entitled to receive it at the time when it should have been paid or turned over, interest is generally allowed.
15. Corporations: Equity. A court of equity will not permit mere corporate forms to serve as a cloak and a shield to the perpetration of a fraud, but will examine the whole transaction, looking through corporate forms to the substance of things, to protect the rights of innocent parties, or to circumvent fraud.

Appeal from the district court for Lancaster County: RICHARD M. VAN STEENBERG and HERBERT A. RONIN, Judges. Affirmed as modified.

Herman Ginsburg and Max Kier, for appellants.

Perry & Perry and Crosby, Pansing, Guenzel & Binning, for appellees Dolores Lucille Workman et al.

Mason, Knudsen, Dickeson & Berkheimer, Woods, Aitken & Aitken, and Ralph H. Gillan, for appellees First Continental Nat. Bank et al.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This is an appeal from the judgment of the district court for Lancaster County, Nebraska, in an equitable action based on alleged fraud after trial to the the court on the merits.

It is the second appearance of the case before this court. Our previous opinion is reported as Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186. We there reviewed the previous decision in which the trial court had entered a judgment of dismissal on a motion for summary judgment made by some of the defendants, and for judgment on the pleadings by the others. That decision reversed the judgment of dismissal and further directed the trial court to permit the minor defendants to appear and plead by their mother and next friend.

The action when formerly before us was pending on the third and supplemental petition filed by Dolores Lucille Workman, individually and as guardian of Joseph Workman, Robert Workman, and Francine Workman, minors, as plaintiffs. After the cause was remanded another petition was filed by these same minors by Dolores Lucille Workman as their mother and next friend. It adopted and ratified the allegations of the third amended and supplemental petition and made

further allegations by way of elaboration and clarification, but the two petitions substantially stated the same cause of action. Dellouise Workman Carroll, a married sister of the minors, had previously to our former opinion filed an answer which likewise adopted the allegations of the third amended and supplemental petition as her own. The action proceeded to trial on these two petitions, one of Dolores Lucille Workman, individually and as guardian, the allegations of which were adopted by Dellouise Workman Carroll, and the petition of the minors by their next friend.

Each of these petitions alleges that plaintiff Dolores Lucille Workman and defendant Frank M. Workman were formerly wife and husband. While the marriage relation existed Frank M. Workman fraudulently represented to the plaintiff Dolores Lucille Workman that it was desirable to convey real estate, then owned by them jointly and operated as partners, to corporations as a planned disposition of their estates and to save income and federal estate taxes, stating the income would still be available to the grantors in their lifetime and their children would be benefited by any surplus of income not used by them. Relying on these representations plaintiff joined with her husband in conveying all their real estate, consisting largely of apartment houses in Lincoln, Nebraska, to four corporations organized at that time. Two of these corporations were the defendants Capitol Investment Company and Capitol Land and Investment Company, each of which received such conveyances. The stock of both these corporations was transferred to the "Workman Trust" of which their children, the said minors, Joseph, Robert, and Francine Workman, and their sister Dellouise Workman Carroll, were beneficiaries, except 1 share in each, which was retained by Frank M. Workman. It alleged Frank M. Workman and his parents, Lewis M. Workman, since deceased, and Clara D. Workman, had entered into a conspiracy and fraudulent scheme and device both to

defraud the plaintiff Dolores Lucille Workman of her interest in the marital estate and also to render the gifts to said children and the Workman Trust wholly or partially ineffective. To accomplish this Frank M. Workman, as president of each of these corporations whose stock had been so assigned to the Workman Trust, made separate leases to his parents, either individually or as partners, or to corporations ostensibly owned by them, but really owned and controlled by Frank M. Workman; and that said leases were both for long terms of 10 years and for improvident rents to enable rentals of great value to be diverted and siphoned off before reaching the corporations or the trust in which the children were beneficiaries. As a result Frank M. Workman retained the use and ownership of the property whether title was ostensibly in his parents or the corporate entities; and that Frank M. Workman, with the apparent acquiescence of the trustees, so managed the real estate that little or no profit accrued to said corporations, which resulted in either no dividends or inadequate ones being declared. The defendant Apartment Supply House, a partnership, composed of said parents, and the defendant corporations, Capitol Enterprises, Inc., and Apartments, Inc., were alleged to be used for the purpose of receiving property pursuant to the scheme. The defendants Capitol Investment Company and Capitol Land and Investment Company were corporations used to further said scheme, and the Workman Trust was alleged to be established for the same purpose, and its trustees Continental National Bank of Lincoln, now First Continental National Bank and Trust Company, and Frederick J. Patz were made parties defendant after demand was made upon them to institute proceedings, and their failure to act.

The prayer asked the leases be adjudged null and void and cancelled; that a constructive trust be imposed upon the property of Clara D. Workman and Lewis M. Workman, the Apartment Supply House, Apartments, Inc.,

and Capitol Enterprises, Inc., as recipients of the diverted income in favor of the plaintiffs; and that an accounting be had of the rents and profits on the fraudulent leases in favor of the minors and Dellouise Workman Carroll, and for general equitable relief, including a personal judgment against Frank M. Workman, Clara D. Workman, and the estate of Lewis M. Workman, deceased.

For convenience the plaintiffs Dolores Lucille Workman, individually and as guardian of the minors, Joseph Workman, Robert Workman, and Francine Workman, and the minors themselves appearing by their next friend, and Dellouise Workman Carroll, may hereafter be referred to as "the plaintiffs." The defendants Clara D. Workman, as executrix of the estate of Lewis M. Workman, Clara D. Workman, Apartment Supply House, Frank M. Workman, Apartments, Inc., Capitol Enterprises, Inc., Capitol Investment Company, and Capitol Land and Investment Company, against whom the judgment was entered and who often join together in pleadings and motions, may at times be designated as the "principal defendants." At times the Capitol Investment Company and Capitol Land and Investment Company, whose stock was placed in the Workman Trust for the children, will be designated as the "children's corporations." The defendants First Continental National Bank and Trust Company and Frederick J. Patz, trustees of the Workman Trust, may be referred to together as "the trustees," and when separately mentioned, as the "trustee bank" or the "trustee Patz."

The principal defendants appeared specially to the petition of the minors by their next friend and challenged the jurisdiction of the court over their persons, contending the petition was a new and independent action by different plaintiffs and no summons had been served upon them. This special appearance was overruled but it was thereafter preserved in all filings of the principal defendants. The principal defendants then

filed a motion to require the plaintiff Dolores Lucille Workman to elect whether she prosecuted the action as next friend, or whether individually, or in her representative capacity. Thereafter, a motion to require the plaintiff to separately number and state her causes of action was filed by them. Both motions were overruled. They then demurred to this petition, generally and specially assigning as the grounds of the special demurrer that the court had no jurisdiction of their persons or the subject matter; that the action constituted a departure from the original action; that the plaintiff was without capacity to sue; and that there was a defect of parties plaintiff and defendant. The demurrer was overruled.

The principal defendants then filed an answer, containing a general denial and several affirmative defenses which, so far as are necessary to be discussed, were: That the cause of action pleaded was foreign to the original petition, filed April 8, 1955, and constituted a departure; that no claim had been filed in the county court of Lancaster County, Nebraska, in the Lewis M. Workman estate and the revivors were not revivors as to any claims of the minors or guardian; that all controversies between Dolores Lucille Workman and Frank M. Workman had been settled by stipulation, hence there was no cause stated against Frank M. Workman; that Dolores Lucille Workman is neither a proper nor necessary party to the action and that there is a misjoinder of parties plaintiff; and that Dolores Lucille Workman prosecutes as an individual, as guardian, and as next friend, and there is a misjoinder and defect of parties plaintiff.

The original answers of the principal defendants to the third amended petition of Dolores Lucille Workman, individually and as guardian of the children, contained these same affirmative defenses.

The defendant Joseph Workman, a minor 17 years of age, filed a motion objecting to the appointment of his

mother, Dolores Lucille Workman, as his guardian and her appearing for him as next friend and stating he did not desire to be so represented, and asks the action as affecting him be dismissed. This was overruled. It is so obvious that the duty of the representatives of minors and of the court in litigation affecting them is to protect their rights regardless of their willingness to give them away that his objections will not be again alluded to.

The trustee bank answered the petition of the minors by their next friend as it had previously answered the third amended and supplemental petition, admitting that demand had been made upon it to bring action to cancel the leases in question and that it had taken no action, and containing a general denial of all other allegations.

The trustee Patz had previously answered the third amended and supplemental petition with a general denial coupled with an allegation that he resigned as such trustee effective October 12, 1957; and that he never had any assets of the Workman Trust and had not participated or acquiesced in any fraudulent scheme or conspiracy. He never answered the petition of the minors by their next friend.

The plaintiffs filed an amended reply containing a general denial and further alleging that Frank M. Workman had not paid the rent to Capitol Land and Investment Company, a corporation, on the residential premises known as 940 South Cotner, occupied by Dolores Lucille Workman as provided in the decree of divorce granted, pursuant to this court's decision in Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368, which occasioned a loss to that company and, accordingly, to the plaintiffs.

The principal defendants filed a motion to strike the amended reply or, in the alternative, to strike all allegations except the denial of the minors by the guardian and next friend. This motion was overruled.

Thereafter a trial was had in the district court which

resulted in a judgment being rendered, on December 30, 1960, against the defendants Frank M. Workman, Clara D. Workman, Clara D. Workman, executrix of the estate of Lewis M. Workman, deceased, and Apartment Supply House, the parents' copartnership, in the amount of $176,977.52, and costs, and impressing an equitable lien on any property purchased by said defendants, either in their individual capacities or through Apartment Supply House, a partnership, Apartments Inc., a corporation, Capitol Enterprises, Inc., a corporation, Capitol Investment Company, a corporation, and Capitol Land and Investment Company, a corporation, between July 1, 1950, and December 30, 1960, and also entered the same judgment against the First Continental National Bank and Trust Company and Frederick J. Patz as though they were sureties, restraining the enforcement of the judgment against them until the assets of the primary obligors had been exhausted.

The principal defendants and the trustees filed separate motions for new trial.

The judge who heard the case and rendered judgment being unable to hear the motions for new trial, the hearing thereon was continued and the evidence transcribed and made available to the court. On August 15, 1961, at a subsequent term an order was entered which modified nunc pro tunc the judgment as entered by changing the word "plaintiff" as it appeared in the journal to "plaintiffs." This order further found the judgment against the trustees was not supported by the evidence and was erroneously entered, and that part of the judgment was canceled and withdrawn. It also found that evidence disclosed the furniture in the apartment houses conveyed to the children's corporations was included and intended to be transferred to those corporations and awarded it to them. It barred Clara D. Workman and Apartment Supply House from making claim thereto aside from certain subsequent acquired furniture purchased in the sum of $1,623.05 as to the Laverty Apart-

ments belonging to the Capitol Land and Investment Company, and $65.10 for the Jackson Apartments belonging to the Capitol Investment Company. It directed the children's corporations to pay said sums to the Apartment Supply House on taking possession of the furniture. In other respects the motions were overruled.

Separate motions for new trial were filed on the part of the principal defendants. Like motions were filed by the plaintiffs. These motions being overruled all the defendants, except the trustees, have appealed to this court and the plaintiffs have cross-appealed. Numerous errors have been assigned by the defendants and the plaintiffs in their respective briefs. Those that are necessary in arriving at this court's decision will be stated as they are discussed.

The first error assigned by the principal defendants is that the order of appointment of Dolores Lucille Workman as guardian of the minor defendants was not final because of an appeal pending from the order of the county court appointing her, which had not been superseded. This aspect of the proceeding was fully settled by our previous decision. This court held that where an infant's rights are involved and it appears to the court the infant is unrepresented by anyone with the power and duty of protecting his interests, it is the duty of the court to appoint one that has such power and duty. It directed the minors by their next friend to be substituted in place of the guardian. It became the law of this case and the substitution pursuant to the decision of this court was made, and no contention can be now made concerning it. Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186.

The principal defendants contend that the trial court erred in not sustaining the special appearance of the defendants made to the petition of the minors by their next friend because another summons was not served upon them. The petition of the minors by the next

friend upon being filed, as ordered by this court in Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186, relates back to their first appearance by their alleged guardian on filing the second amended petition in which the cause of action set out by the guardian names and refers to them and first sets out a cause of action in their favor as plaintiffs. Thereafter, all the defendants filed answer and moved the court either for a summary judgment or a judgment on the pleadings. The minors were the real parties plaintiff long before the special appearances filed by the defendants. No new service of summons was necessary.

The next assignment of error of the principal defendants is that the cause of action pleaded was foreign to that in the original petition and constituted a departure. This they urge has special significance as to the defendant Clara D. Workman, as executrix of the estate of Lewis M. Workman, because no claim was filed in his estate. The first petition filed in this action on April 8, 1955, sets out a fraudulent conspiracy, scheme, and device among the same persons but only relates it, as far as the one victimized is concerned, to Dolores Lucille Workman. It sought to pursue the assets and establish a constructive trust for her benefit only. The first amended petition stated the same conspiracy and fraud and seeks the same relief. It brought in more corporate defendants whom it was alleged were fraudulently used to further the scheme. Dolores Lucille Workman had by then secured a divorce and a judgment for alimony. This judgment then had restricted her interest in the marital estate and it was alleged that the fraudulent scheme was to reduce the marital estate and defeat the judgment for alimony. The second amended petition again set out the same fraud but went further and Dolores Lucille Workman joined as guardian, alleging her minor children there named and Dellouise Workman Carroll were also defrauded because of further steps taken by the conspirators pursuant to said scheme.

The contents of the third amended and supplemental petition have been summarized. The defendants' contention of a departure was set out and discussed in the previous opinion in Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186, but the court there finally stated that judgment on the pleadings was not the appropriate way to present the objection. All the petitions mentioned set out equitable actions to establish a constructive trust on the property, real and personal, of the defendants in which the diverted assets and income had been placed as a result of the same fraudulent scheme of the same individual defendants. It was not necessary that a claim in the decedent's estate be filed in the county court before bringing a suit in equity to establish a constructive trust and the lien of the plaintiffs on the property, real or personal, of the defendants. § 30-609, R. R. S. 1943. No action could have been maintained in the county court to fasten a lien on the decedent's real property as our Constitution gives that court no jurisdiction over the title to real estate. Bratt v. Wishart, 136 Neb. 899, 287 N. W. 769. Not only was the action one that could be maintained without a claim being filed in the county court, but the suit was commenced in the lifetime of the decedent. It was revived by two stipulations of the parties for revivor after his death, one joined in by special administratrix, the other by his executrix. The principal defendants contend that the revivor of the action was not a revivor as to any claims to be asserted by the minors and Dellouise Workman Carroll but applied only to the claims of Dolores Lucille Workman first set out in the original petition. filed April 8, 1955.

"A suit for the establishment or enforcement of a constructive trust may be maintained by the person prejudiced or deprived of a benefit by the fraud, actual or constructive, which gives rise to the trust, or by the successors in interest of such person; * * *." 90 C. J. S., Trusts, § 433, p. 831.

"All persons may join in a suit to establish and enforce a trust who have similar interests, arising out of the same trust, and who are seeking the same relief, although their interests are not joint, and the joinder of a person without interest has been held not to be fatal; * * *." 90 C. J. S., Trusts, § 457, p. 895. In this state our statute, section 25-328, R. R. S. 1943, gives a person who has an interest in the matter in litigation and in the success of either party to an action a right to intervene in the litigation either before or after the issue has been joined and before the trial begins. This is what the minors did when their mother, as guardian, whether properly appointed or not, brought them into the litigation and set up their rights.

The principal defendants assign as error the trial court's overruling their demurrer for misjoinder of causes of action to the minors' petition by their next friend. In equitable actions considerable leeway is allowed in pleading and there arises the question in all such cases whether one or more causes of action are stated. "In order that there be but one cause of action, it is unnecessary that the wrong consist of a single act or omission, at least where the acts are closely connected and contribute to the accomplishment of a common purpose, or that the resulting injuries consist of but a single element; likewise, the amount sought to be recovered may be made up of several items, and the designation by plaintiff of one item as involving a different wrong than the others is not controlling." 1 C. J. S., Actions, § 65, p. 1188. Neither is it required that in such cases it affects all persons alike. In 1 C. J. S., Actions, § 72, p. 1203, it is stated: "A multiplication of parties does not necessarily increase the number of causes of action, even where defendants are not jointly, but severally, liable, and a complaint or petition may state but a single cause of action, even though it affects a number of persons, either as plaintiffs or as defendants, although defendants are liable or may be held liable upon

different and separate principles of law, or affects several distinct parcels of land separately owned by different persons. This is particularly true in actions of an equitable nature which require a working out and adjustment of the rights and liabilities of a number of persons, or the exercise of different forms of equitable power, and the granting of different forms of relief, it being proper in such actions to join as parties all persons interested, * * * and unnecessary that they be affected in the same manner or to the same extent. In like manner a complaint may state but a single cause of action, although it affects the same person or persons in different capacities." We hold there was but one cause of action stated for conspiracy, fraud, and deceit and that it sought a common object of establishing a constructive trust in which all the parties were interested.

Having found there was but one cause of action it follows that there was no error in overruling a motion to separately number and state the several causes of action, in overruling the demurrer for misjoinder thereof, and in finding there was no departure therefrom.

The principal defendants however urge that in any event after the settlement of the claim of Dolores Lucille Workman she should have been required to elect in what capacity she brought suit, or that she be dismissed from the action and her name stricken from the pleading. It is only necessary to ask what harm resulted to the defendants by not striking her name or dismissing her from the action. She appeared for the minors as their next friend. She was permitted to do so by the decision of this court. In that capacity she could assert any and all claims and take any step to prosecute the cause; and employ counsel and give to them the benefit of her knowledge of the facts.

It would seem it would make no difference to a trial judge sitting in an equity case in determining the issues whether her name remained on the pleading in more than one capacity. In Hert v. City Beverage Co., 167

Neb. 557, 94 N. W. 2d 27, this court said: " 'Before an error requires a reversal it must be determined that it was prejudicial to the rights of the party against whom it was made.' Buhrman v. Smollen, 164 Neb. 655, 83 N. W. 2d 386. See, also, Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109.' " There was no prejudicial error in this respect.

The next error urged by the principal defendants was that the trial court failed to find the controversies between Frank M. Workman and Dolores Lucille Workman had been settled by stipulation and that therefore there was no cause stated against him. The stipulation of settlement particularly referred only to the claim of Mrs. Workman and clearly provided that either party could amend his pleadings after dismissal of the action by Dolores Lucille Workman and the issues be subject to trial upon the merits. That Frank M. Workman was still a party to the litigation was decided in our previous opinion and had become the law of the case.

The assignment of error with respect to overruling of the demurrer was not discussed by the principal defendants in regard to the portion thereof which alleged that the petition did not state a cause of action and need not be discussed by us.

We come now to the question of whether the judgment was supported by the evidence and was in accordance with the law. This entails a discussion of the evidence at the trial. There is great conflict in the evidence in the bill of exceptions. It contains evidence of the plaintiffs which would substantiate their petition if given credence, and evidence which substantiates the principal defendants' position if believed. We will first outline the evidence supporting the two conflicting theories and then give the reasons that impel this court to its conclusions.

The plaintiff Dolores Lucille Workman and defendant Frank M. Workman were formerly wife and husband. They had acquired extensive real estate holdings con-

sisting principally of apartment-house property in Lincoln, Nebraska. In the fall of 1954, a divorce suit was pending between them. They had had trouble as early as 1949, and a previous action for divorce or separate maintenance had been commenced. Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368. In the year 1949, lawyers were consulted by Frank M. Workman concerning the formation of corporations and trusts in which to place their property. Shortly thereafter four corporations were formed and two trusts. The Workmans conveyed their property to these corporations, which included Capitol Investment Company and Capitol Land and Investment Company.

Real estate referred to as 1115 H Street and 1118 H Street, Lincoln, Nebraska, was, on November 23, 1949, exchanged and deeded by the Workmans for 54 shares of stock of the Capitol Investment Company, being the entire issue except one share kept by Frank M. Workman. In the testimony 1115 H Street is usually referred to as the Jackson Apartments, and 1118 H Street is referred to as the Troy Apartments. The Troy Apartments were being sold and no issue is presented with respect to it or its sale.

Real estate was on the same day exchanged for 335 shares of the capital stock of the Capitol Land and Investment Company, being the entire issue except one share kept by Frank M. Workman. The real estate was located at 429 South Twelfth Street and was called the Laverty Apartments. Also, there was included the family home of Frank M. Workman and wife at 940 South Cotner.

On February 20, 1950, the Workmans executed an irrevocable trust agreement for the benefit of their four children: Dellouse Workman Carroll, and the minors, Joseph, Robert, and Francine. The Bank and Patz were trustees and executed the agreement and accepted the trust. The 54 shares of Capitol Investment Company and 335 shares of Capitol Land and Investment Com-

pany were conveyed to this trust by the Workmans, as donors. The Workman Trust will hereafter be called the "Children's Trust." The trust agreement, among other things, provided that the trustees were to hold, manage, and care for the property and collect and receive the rent, issues, interest, and dividends thereon. They were to pay and apply the income not less than annually in equal shares to the children of the donors, and on termination of the trust to distribute the property to the children. They were given power to vote in person the shares of stock held in trust. It provided that they were to furnish the donors and the beneficiaries a statement annually of receipts and disbursements.

The gift tax return to the federal government discloses the gift of the capital stock was valued at $81,301.64 above encumbrances. At the time of the leases herein mentioned and for several years afterward Frank M. Workman was president of both corporations; Ralph Gillan was secretary; and they with Frederick J. Patz, cotrustee of the Workman Trust, were directors of the children's corporations and other corporations managed by Workman.

On July 1, 1950, Frank M. Workman, as president of each of the children's corporations, made separate leases of the apartment real estate owned by them in the name of the corporations to the Apartment Supply House, a copartnership, of which his parents were the partners. Each lease was for a term of 10 years.

The lease of the Jackson Apartments by the Capitol Investment Company was for $275 per month; and the lease of the Laverty Apartments by the Capitol Land and Investment Company was for $565 per month. On December 1, 1950, the separate boards of directors of each company ratified all conveyances of real and personal property, including leases made in the past by the president and authorized the president and secretary to execute all such instruments in the future. On January 31, 1950, each company by resolution of its board of di-

rectors employed Frank M. Workman to manage the companies' properties for $2,500 a year from each corporation.

These two leases to the Apartment Supply House, a partnership, composed of Frank M. Workman's father and mother, are the alleged improvident leases which the plaintiffs claim were fraudulently made.

The evidence tending to show fraud introduced is very voluminous. We will at this point outline particular portions that impress the court as important.

In 1949, Lewis M. Workman was 66 years of age and Clara D. Workman was 63. They appear not to have been very successful in business. Workman was in a restaurant business between Twenty-sixth and Twenty-seventh Streets on Randolph Street in Lincoln, beginning in 1932 or 1933, and ending in 1944. Before that he ran a poolhall. In the restaurant business they had two employees, a waitress and dishwasher. Clara said they did pretty well making a living. They did not sell out. Lewis got sick and they just quit. The fixtures were sold later but Clara doesn't remember to whom. Lewis went to work at the Air Base but was not well and couldn't stay at work there. He quit after a few months. Clara received $35 or $36 a week cooking and making pies at the Sun Coffee Shop for 3 years, ending in 1947. After quitting the Air Base, Lewis drove a Yellow Cab and a Lincoln bus for about 2 years. Clara did not work again because Lewis was sick with a bad heart, asthma, and arthritis. He was hospitalized three times in 1955. Lewis testified that after quitting work for the interurban in 1929, he went into trucking and had about $1,600 invested in trucks which he wore out and he got very little for them. He estimated the loss on the trucks left him in the hole except for his home. He then started an antique furniture and repair business. Finally he quit and they had an auction sale and sold $500 or $600 of the stock, but it was going too cheap and he took 21 boxes home. In a deposition he said he didn't know

much about the Apartment Supply House business and had not been to the office for 8 or 9 months on account of illness and confinement in the hospital. He didn't owe Frank M. Workman a "dime." He paid off the only note Frank had over 5 years ago. He later admitted giving one of the notes for $10,000 to Frank. Frank has been taking care of the books and they could find out matters at the office. The $10,000 represented by the note shown him was all they ever got from Frank.

Frank M. Workman took one of his children and both his parents as three dependents in his income tax return for 1949. Dolores Lucille Workman took the other three children on a separate return. She testified that prior to 1949 Frank had given his parents an allowance of $20 a week.

The income of Lewis and Clara Workman began its phenomenal growth the year the leases to their partnership were given by the children's corporations. In 1950, they had a gross rental income shown on a joint return of $51,428.21, and after paying their son Frank $5,063.50, and taking $2,512.09 depreciation, their net income was $17,132.39. In 1951, gross rental income had increased to $85,647.70, and the net to $21,400.56. Thereafter their gross rental income varied from a low of $80,680.75 to a high of $92,949.62, to and including the year 1957. During the same years their net income varied from a low of $17,457.80 to a high of $38,158.42. The parents received other property conveyed to them by Frank M. Workman and his wife but the gross receipts from rentals of the apartments leased by the children's corporations must be set out later herein and it will be observed that those receipts constituted more than half of these rentals.

Frank M. Workman made the leases to his parents on behalf of the children's corporations on July 1, 1950, within less than 6 months of the execution of the Workman Trust agreement. Previously to setting up the corporations and the trust, according to his wife, he had told her that when rent controls were lifted they could

get more rents. Rent controls were terminated by an act of the Legislature of Nebraska which went into effect August 27, 1949, but the elimination of controls was delayed until its provisions were reported to Washington and it became fully effective November 1, 1949.

Grover K. Baumgartner, president of Lincoln Mutual Life Insurance Company, testified he took an application for a loan on the Jackson Apartments on December 26, 1951, from Frank M. Workman as president of the corporation. The application when presented had a letter attached from Loomis & Johnson, who appraise real estate, directed to Workman purporting to answer a letter from him requesting an appraisal. The letter states Workman had given them the information as to income upon which to base their appraisal. It shows the gross annual income to be $17,000. The operating expense was set at $5,100, 5 percent for vacancies and rent losses $850, an allowance for management of $850, and tax increase $175. This left a net income of $10,025. According to this report it contained 30 apartments and 10 garages. A similar application dated the same day in regard to a loan on the Laverty Apartments had a similar letter attached stating there were 60 apartments and the gross rentals were $27,000; the expense with similar allowances $10,950; and that the net rentals were $16,050. There was considerable evidence that there were 72 apartments at the Laverty, but it is disputed. A letter requesting an appraisal from a member of the same firm on November 30, 1951, signed by Frank M. Workman, shows the gross receipts of the Laverty Apartments were $27,033 in 1951, with like expense of operation $7,971, making net rentals $19,062, with like deduction for management, vacancies, and rent losses. It also shows the gross rentals of the Jackson Apartments to be $16,922, expenses $5,092, with the same deductions, leaving net $11,830. Frank M. Workman maintained that there were certain expenses pertaining to management and liability insurance not listed.

Baumgartner and other witnesses familiar with such rental properties testified that the leases were improvident; that they were for inadequate rentals considering the properties and their income and considering the children's corporations were to pay the taxes on the real estate; and that no provision was made to increase the rentals in case of a raise in the taxes during the 10-year period. Other witnesses testified the rentals were adequate. They base their opinions on the fact that the expense and trouble of managing the properties was eliminated thereby. Comparisons of leases were made with those of other apartment houses but certain of the leases with which the defendants made comparisons were those made sometime before the more difficult times and which by reason of the length of their term had extended into the time within which the leases in question were made.

Frank M. Workman explained the leases were given because he could not attend to them; that his parents could do so and were able to do so; and that they were able and responsible persons. He testified he had diabetes and had to take insulin, and his company properties were growing. He stated one reason for the leases being made to his parents was that there was a possibility of a bomb hitting the Laverty Apartments and leases to responsible parties would then pay off the mortgage.

Frank M. Workman received the following notes from his parents: December 3, 1949, $10,000; May 23, 1952, $8,000; December 31, 1953, $8,614.03; April 12, 1950, $10,000; and March 10, 1953, $5,000, totaling $41,614.03. Their existence was discovered by Dolores Lucille Workman's attorneys when a deposition was taken in the divorce proceeding on November 26, 1954. Frank Workman said they were taken for services although it appears from all the evidence some were taken for loans. He said he never expected to collect them because his parents owed them to him and he figured some day "they would come down to an, estate, probably." Though

he was not figuring on collecting them, they owed him. Later he stated that part of these notes was taken just for tax purposes. Part of them was taken for services for management of Apartment Supply House when he received a 10-percent commission for management. He took them with the intention of letting the notes ride as it was cheaper for tax purposes to claim a salary. On December 1, 1954, within 5 days of taking the deposition in which he testified about these notes, he made an endorsement on most of them substantially similar to the following: "I do hereby cancel all interest due and accruing on this note since December 31, 1953, and do cancel and waive any rights to any interest on said note for all time in the future, and I hereby assign and deliver this note to The Continental National Bank, Trustee of the Frank M. Workman Trust (an entirely separate trust), without recourse, and I do hereby extend the maturity date of this note to the date of my death, or date of death of survivor of my parents whichever date is the later."

On July 15, 1950, Frank M. Workman entered into a written contract with the Apartment Supply House to manage its business, keep its records, to arrange to buy and sell its business properties, and to promote expansion for which he was to receive 10 percent of the gross income before expense. This he canceled July 24, 1954. He testified he canceled this contract about the middle of the year "because we seen how things were going." The income tax returns of Lewis and Clara Workman showed they paid their manager this 10 percent and that from 1950 to 1953, both inclusive, the payments amounted to $30,708.42. However, at least a substantial portion of these commissions was not paid in cash but was taken in the notes hitherto discussed.

If, as asserted, one of the chief reasons of Frank M. Workman in making the leases to the Apartment Supply House was to avoid so much work because of his physical condition due to diabetes, it seems he failed in his

objective. The evidence indicates he did practically all the management that he did before. Edna Kildaw, the caretaker of the Jackson Apartments from July 1950 to October 1958, testified she received no compensation except her apartment until October 1955, when she received $15 per month for cleaning. She testified that neither Lewis nor Clara Workman was on the premises for business purposes in the 8 years of her employment there. This caretaker received the rents, paid part of the bills, and deposited the balance in the bank. Frank M. Workman paid other bills. On a few occasions Edna Kildaw called Clara D. Workman by telephone when she couldn't get into touch with Frank. She kept a record for herself of the receipts and a duplicate of the deposit slips at the bank. These records of rentals deposited were in substantial agreement with the reports of Frank M. Workman given on the loan applications.

Clara D. Workman testified the caretakers did a lot of the business and she herself seemed to know little about it. She did not know what rent they paid for the Jackson Apartments or the Laverty Apartments, nor who paid it. She did not know how many apartments there were in the Jackson Apartments or the Laverty Apartments. She did not know how much rent they collected because the caretakers collected it. She did not know the number of stoves or refrigerators she owned. She says she thought the apartments were making money but she didn't know how much. Nor does she know whether the rentals produced at the Laverty Apartments were as much as $2,250 per month because, as she said, it doesn't belong to me, but to the children's trust fund. All she had was just the furniture. The caretakers collected and turned the rent over to Frank M. Workman's office. The money from the apartments doesn't come to her. Dellouise Workman Carroll was present when Frank brought checks and papers to Clara Workman for her signature. She testified Clara signed them without reading them and without question

and, from her appearance, without apparent understanding. Clara Workman, in a deposition taken February 26, 1955, admitted writing checks for her living expenses on the Apartment Supply House. They were for groceries and doctor and hospital bills, but she testified she wrote no checks for Apartment Supply House to pay expense and neither did her husband Lewis. Frank looked after that. Clara Workman testified Apartment Supply House owned a Cadillac automobile; that she had no driver's license but was learning to drive; that Lewis drove it but a few times; and it was used by Frank generally.

A witness Emma Sommers testified Clara D. and Lewis M. Workman were formerly her sister-in-law and brother-in-law; that although the relationship terminated in 1918, they continued to be friendly and close. The witness visited their home in October 1949. She was there about a month. She was in Lincoln throughout October and stayed overnight at the home of Lewis and Clara Workman. While Lewis and Clara were there, Frank came in. Frank stated that Lucille wasn't able to take care of the children and he was going to fix it so she "couldn't have nothing" as she had nothing when they were married. Frank said he was disgusted with "Lucille" and that she deserved nothing. Lewis Workman stated in the conversation that "Lucille" wasn't in her right mind. Clara, Lewis, and Frank discussed putting her in an institution, and Frank said they were going to put the money and property in a trust for the children. This witness was again visiting at the home of Lewis and Clara in February of 1950. Frank was there and he said everything was put in the children's trust fund so Lucille couldn't get anything. Lewis and Clara then said that that was a good thing. The witness testified that prior to 1949 Frank was giving the parents $20 a week and that they had accumulated no money or property prior to 1949. Lewis, she said, was not able to work in 1949.

The evidence shows that from large profits from sales of other property conveyed to the parents by Frank M. and Dolores Lucille Workman, and from rentals received from the apartments leased to them from the children's corporations and the other properties so conveyed, that the parents bought a motel in Columbus, Nebraska, which was in June of 1954, placed in a corporation named Apartments, Inc., a defendant herein. From rentals on the motel and from rentals from the other property vested in them by conveyances from their son, his wife, and the children's corporations, the parents bought a motel called the Country House Motel near Omaha, Nebraska, for $87,500, which property was placed in the name of a new corporation, the Capitol Enterprises, Inc., another one of the defendants. Lewis M. Workman and Clara D. Workman owned all the capital stock in these corporations. They originally owned all the capital stock of Capitol Enterprises, Inc., but later it was transferred to Frank M. Workman for $1,000.

That the furniture in the Jackson and Laverty Apartments was originally given and transferred to the children's corporations is clearly shown by the written offer of Frank and Dolores Lucille Workman to exchange the real estate for the capital stock. Frank M. Workman admits the children's corporations owned this furniture on February 20, 1950. He states this furniture was sold to his parents in 1950. The income tax of the parents shows they took depreciation on this furniture in 1950 and the same was listed as purchased on May 20, 1950. Frank M. Workman testified the furniture was sold but he was not sure how it was paid for. There might have been a note when the deal was made. He was not sure whether the note was one of those given to him or not, but didn't think so. He thought it was paid for by borrowed money from the National Bank of Commerce. He then stated they made the deal for the furniture and gave a note with the understanding they were to borrow the money, which he said they did. The income

tax return of the Capitol Investment Company for the year 1950 shows a sale of furniture for $3,500 and a capital gain thereon of $1,336.30. The balance sheet, schedule L of the return, shows notes and accounts receivable of $4,500. For the same year the return of the Capitol Land and Investment Company shows a capital gain of $1,511.15, but no capital gain sheet is attached to indicate what was sold and the balance sheet, schedule L attached, shows nothing to indicate corresponding cash or notes in the assets at the close of the year. A consolidated balance sheet of all the Workman corporations given by Frank M. Workman on making application for loans, November 4, 1950, shows no notes belonging to either of the children's corporations. Both corporations have some furniture. The cash balances of each are less than $300 and only the Capitol Investment Company has any accounts receivable which were $4,500. The evidence does not disclose how the furniture was ever paid for. Frank M. Workman, however, maintains that the furniture was owned by his parents and that was one of the reasons for making the leases at a less rental; and that the furniture had a rental value of five dollars an apartment per month. With between 90 and 100 apartments in all, this rental of furniture would be quite substantial and it is not satisfactorily explained why such a sale should have been made with the resulting decrease of the earning power of the children's corporations.

In Peters v. Woodman Accident & Life Co., 170 Neb. 861, 104 N. W. 2d 490, this court in a fraud case involving a corporation laid down the following rules: "A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object or a lawful object by unlawful or oppressive means.

"The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It in-

volves some mutual mental action coupled with an intent to commit the act which results in injury.

"Fraud cannot be presumed or inferred without proof in a court of equity any more than in a court of law. However, courts of equity do not restrict themselves by the same rigid rules as courts of law in the investigation of fraud and in the evidence and proofs required to establish it. However, the proof must be sufficient to satisfy the conscience of the court that fraud is really existent, and to do this, it must be sufficient to overcome the natural presumption, which is always of considerable force, that men are honest and act from correct motives.

"To prove fraud direct evidence is not always essential. Inferences or presumptions of fraud may be drawn from facts and circumstances. However, such inferences or presumptions must not be guess work or conjecture but must be rational and logical deductions from the facts and circumstances from which they are inferred.

"What constitutes fraud is a matter of fact in each case. Deception finds expression in such a variety of ways that courts have studiously avoided reducing its elements to positive definitions. Courts content themselves with determining from the facts in each case whether fraud does or does not exist, for whatever satisfies the mind and conscience that fraud has or has not been practiced is sufficient.

"In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.

"An officer or director of a corporation occupies a fiduciary relation to the corporation and to stockholders.

He is treated by courts of equity as a trustee, and as such is ordinarily personally liable to beneficiaries of a fund for any misapplication of the fund to other beneficiaries not entitled thereto.

"Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself convincing evidence of fraud."

From a consideration of the evidence in the light of these rules we are satisfied that fraud was proved by clear and convincing evidence. Frank M. Workman, as president of the children's corporations, stood in a fiduciary relation to its stockholders. Especially is this true when these stockholders were his minor children of whom he was then the guardian. He prevailed upon his wife, from whom he held a power of attorney, to convey the apartment houses to the corporations for the apparent benefit of their children. He stood in a fiduciary relation towards her also. Shortly thereafter he made the improvident leases to his parents and conveyed to them the cream of the rentals from the property. In his fraudulent actions the parents participated. They conversed with him about it beforehand. The parents knew of the income reaped from their son's actions. They executed income tax returns year after year disclosing it. From straightened circumstances they suddenly became affluent. The bazaar note transactions indicate the dealings between Frank M. Workman and his parents were not in good faith. The parents' testimony indicates they really considered the income they received as not theirs, but Frank's.

The trial court computed the income diverted and for which judgment was entered, and made a lien on the property of the parties whether standing in their names or in that of their corporations in which the fruits of the fraud were placed. The computation was year by year and to the amount diverted each year was added inter-

est from the close of the year to the date of judgment. Those computations are here set out. The net amount diverted to December 31, 1950, was $8,139.84; interest thereon from said date to the day of judgment, December 31, 1960, at 6 percent, $4,883.90, making a total of $13,023.74. Thereafter, net receipts at the end of each calendar year followed by the interest to the date of judgment are here set out: 1951, $16,279.67, interest $8,791.02; 1952, $14,225.58, interest $6,828.24; 1953, $13,-798.41, interest $5,795.30; 1954, $11,918.23, interest $4,-290.54; 1955, $16,740.17, interest $5,022.05; 1956, $15,-097.48, interest $3,624.20; 1957, $14,619.20, interest $2,-631.45; 1958, $8,732, interest $1,047.84; and 1959, $9,-210.57, interest $558.63. For the period ending at the termination of the leases on July 1, 1960, the net rentals were $4,605.29 and interest to judgment, $138.16. The sum of these amounts of each year's rentals diverted, with interest, makes the total of $176,977.52, for which judgment was entered.

For the full years 1951 to 1959, inclusive, these figures were computed from the books of the Apartment Supply House, being the annual summary of income and expenses shown on the Laverty and Jackson Apartments. The computation was accomplished by taking the sum of the gross receipts from the two apartments and first deducting 10 percent thereof, from the gross, which the court allowed the defendants collectively for management. Thereafter the actual expense of the two apartments as disclosed by these annual summaries was deducted also.

The computation of the first 6-months' income and expenditures for the period beginning July 1, 1950, to December 31, 1950, was of different character. The trial court approximated this income by taking half of the year closest to the 6-months period both for income and expenditures. There is other evidence however justifying this amount. The computation for the last 6 months was taken by combining the monthly reports

of January to June, inclusive, of the year 1960 from the monthly summaries.

The trial court's allowance of 10 percent of the gross receipts for management resulted in the sum of $43,875.79 being allowed the defendants, collectively, over the 10-year period.

The principal defendants assign as error the inclusion of interest in the judgment on the amount found due at the end of each year from that date to the entry of the judgment. The trust agreement creating the Workman Trust provided that the income received be paid and credited to the beneficiaries not less than annually in equal shares. The children's corporations were reporting their income for taxation at the close of the year. The summary of income and expenditures of the Apartment Supply House was made as of that day. We find it should have been ascertained and distributed at that time to the trust and by it to the children who were its beneficiaries had the trust been operated as it was intended. In 47 C. J. S., Interest, § 13, p. 23, it is said: "Interest should be allowed where the conduct of a party merits its allowance against him, as for some misconduct, breach of trust, or dereliction of duty, or where the person retains funds belonging to another actually making interest thereon. * * * Where money or property belonging to another was not paid or turned over to the person entitled to receive it at the time when it should have been paid or turned over, interest is generally allowed." We think interest should have been charged thereon.

These defendants also assign error in the judgment of the district court which disregarded the corporate entities of the children's corporations and entered judgment in favor of the children as beneficiaries of the Workman Trust. It appears these beneficiaries were entitled to the income in any event. "The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning

of the litigation, but at the time the decree is entered." Conrad v. Kaup, 137 Neb. 900, 291 N. W. 687. "A court of equity will not permit mere corporate forms to serve as a cloak and a shield to the perpetration of a fraud, but will examine the whole transaction, looking through corporate forms to the substance of things, to protect the rights of innocent parties, or to circumvent fraud." Ehlers v. Bankers Fire Ins. Co., 108 Neb. 756, 189 N. W. 159.

The principal defendants assign as error the correction by the trial court of certain portions of the judgment entered herein at the hearing upon the motion for new trial. The correction was made after term on which the judgment was entered but at the hearing of the motion for new trial filed within the time specified by law. The correction consisted of three matters, the first to make the recitation of the judgment creditor "plaintiffs" instead of "plaintiff." The judgment as a whole clearly shows that it was in favor of the plaintiff minors, who appeared by their next friend, and Dellouise Workman Carroll. The notes on the trial docket are that the judgment was in favor of the plaintiffs. The court did not err in correcting the journal accordingly. In such a case it may be done nunc pro tunc. The second was in the court's finding that the furniture in the Laverty and Jackson Apartments, as to which no finding had originally been made, belonged to the children's corporations and entering judgment accordingly. The evidence hitherto discussed seems to substantiate this change in the judgment. A motion for new trial which has been duly and timely filed may be heard at a subsequent term and the court may then pass upon the motion and enter its judgment on the motion for new trial. Petsch & McDonald v. Hines, 110 Neb. 1, 192 N. W. 963.

At a hearing had on a motion for new trial, even after term, in an quitable action heard before the court alone, it would seem that the trial court should be given

an opportunity to correct its own errors in the previous findings and enter the proper judgment, if that can be done without the necessity of a new trial of the whole case. This question poses no special significance in the case before us, however, as it is an equitable action before this court on appeal and is tried by this court de novo.

The plaintiffs as cross-appellants assign error to the trial court in its judgment allowing a credit of 10 percent of the gross rentals collected from the Laverty and Jackson Apartments for the service of the defendant Frank M. Workman in the management of the apartment properties. They point out that the litigation was caused by the fraudulent conspiracy, scheme, and device of the defendants Frank M. Workman, Lewis M. Workman, and Clara D. Workman, and that in such circumstances they are not entitled to compensation for their services. This court in considering the compensation to be paid the trustees who had been guilty of a breach of trust in In re Estate of Linch, 136 Neb. 705, 287 N. W. 88, quoted the authorities there cited with approval as follows:

"In 2 Perry, Trusts and Trustees (7th ed.) 1556, sec. 919, the author states: 'In many states the commissions and compensations of the trustees depend upon their fidelity in the administration of the trust. If they are guilty of any breach of trust, or of any vexatious or improper conduct, the courts can withhold all compensation, or they can allow such compensation as will pay for the value of their services so far as they have been beneficial to the estates.'

"In 65 C. J. 910, with reference to compensation allowance to trustees, we find the following language: 'The accepted rule in this country at the present time, however, is * * * for courts of equity to exercise a just discretion and make or withhold allowance as they consider the particular circumstances require.'" Other cases have withheld compensation entirely to trustees

who have betrayed their trust. Baird v. Lane, 115 Neb. 413, 213 N. W. 512.

In the case before the court Frank M. Workman occupied a trust relation toward his minor children, the stockholders of the corporations of which he was president. Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393. He was likewise the natural guardian of his children and was their legal guardian at the time of the leases in question. His parents were fully aware of the relationship when they entered into the scheme to defraud the children's corporations. It must be conceded that Frank M. Workman was an able operator of apartment houses; that it was his operation and not that of his parents is apparent. He had been very successful in such enterprises; that he managed those involved in the leases well cannot be doubted. In this situation a court of equity is given considerable discretion in allowing compensation for his services even though he was derelict in his duties. On the other hand he has not been wholly uncompensated. He received a salary as president of each of the children's corporations of $1,566.66 for the year 1950. In the years 1951 and 1952, he received $900 from each of them. Thereafter, he was paid $900 a year from one and $600 from the other up to the year 1959. His parents made substantial payments in cash for managing their properties, including those held under these leases. Other payments were evidenced by the note transactions which have been alluded to previously. The trial court allowed the defendant Frank M. Workman 10 percent of the gross rentals for his management of the property when a considerable portion of the necessary work was done by caretakers who collected the rents, paid a portion of the expense, and deposited the rest. Under these circumstances the allowance of 10 percent of the gross rent collections is in excess of that which was proper. There is evidence tending to show that 5 percent would have been adequate, though there is that which is contrary.

Under the circumstances they should have been allowed only 5 percent. This requires that this court compute the amount that should be added to the judgment, with interest. We have placed the gross rents from both apartments, as shown from the evidence, in the first column; the 5 percent which must be refunded, in the second column; and the interest from the close of each year to the date of the decree, which should be refunded also, in the third column.

Half year ending	Gross Receipts	5 percent	Interest to Decree
January 1, 1951	$25,285.70	$1,264.28	$ 758.40
Calendar Yr. 1951	44,448.27	2,222.40	1,200.06
" " 1952	43,528.90	2,176.44	1,044.48
" " 1953	44,152.25	2,207.60	926.90
" " 1954	44,855.11	2,242.75	807.00
" " 1955	46,274.62	2,313.70	694.00
" " 1956	46,279.58	2,313.95	555.20
" " 1957	43,742.79	2,187.00	393.66
" " 1958	39,720.22	1,986.00	238.32
" " 1959	42,128.56	2,106.40	126.36
To July 1, 1960	18,341.82	917.00	27.25
		$21,937.52	$6,771.72

The amount of 5 percent or half the commission allowed, together with the interest thereon, makes the sum of $28,709.24, which amount should be added to the judgment recovered herein.

The gross rentals for the calendar years are taken from the summary of income and expense from the books of the Apartment Supply House at the close of the year. The 6-month period at the beginning of the term of the leases is approximated by taking half of the year as was done by the trial court.

The plaintiffs as cross-appellants, assign error of the trial court because of its failure to enter a judgment against Frank M. Workman alone for rentals they claim were owed on the residence property referred to as 940

South Cotner. It was the residence of Frank M. and Dolores Lucille Workman prior to their divorce, but had been conveyed to the Capitol Land and Investment Company, one of the children's corporations. The opinion of this court in the divorce action of Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368, directed that Frank M. Workman pay the rent on this home to the children's corporations. Prior to 1953 it was rented for $140 per month. Plaintiffs maintain that the evidence shows he had not paid all of this rent and thus reduced the income of the corporations. Frank M. Workman testified he had not paid the rent during the time when the district court in the divorce action had granted his wife, Dolores Lucille Workman, a temporary allowance pending the divorce action because she was then to pay the same. The decision of this court in Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368, decided in 1957, does not specifically state who was to pay the past-due rent. The order of the district court granting the temporary support is not in evidence. Workman testified the rent while the temporary order was in force was paid by neither party to the divorce but that he subsequently paid the arrears back to the date of the Supreme Court decision. The income tax returns of the Capitol Land and Investment Company, for 1955 and 1956, showed some rent was paid by someone during those years. Workman testified the rent was reduced to $110 in 1958 because the children's corporations no longer paid for the utilities at the residence. The corporations' income tax returns indicate the utilities were paid by the corporations previously, but not in 1958, and the returns of a later date are not in evidence. The 1958 return shows more rental than currently required to be collected indicating that past-due rents were being liquidated. Whether more was paid later and in what amounts are not shown. The plaintiffs offered no substantial evidence themselves except the income tax returns. The evidence on this matter is confusing and un-

satisfactory and the burden in that respect was on the plaintiffs and no judgment should be entered thereon.

The plaintiffs assign error to the trial court in the judgment finding that the Capitol Investment Company, a corporation, should pay the sum of $65.10, and the Capitol Land and Investment Company should pay the sum of $1,623.05, to the Apartment Supply House for furniture purchased by it that went into the Jackson and Laverty Apartments during the lease. The depreciation schedule in the income tax reports of Lewis and Clara Workman shows new furniture purchased during the term of the leases in at least those amounts. It is true that when property is commingled by a wrongdoer with his own in a manner that prevents identification of the several items, the wrongdoer may be deprived of that which was his. However, a court of equity has considerable discretion in such cases. Here the plaintiffs by this decision are given the rents from the properties, including the furniture so purchased. The furniture is by the court restored to the children's corporations which have now been reorganized. The amount which these children's corporations are to pay to reimburse the Apartment Supply House for the furniture is without interest. Under such circumstances we find no error in the trial court's judgment directing the payment of the purchase price.

The plaintiffs have assigned as error the ruling of the trial court which, on the hearing of the motion for new trial, sustained the motion with respect to the cotrustees and withdrew the judgment against them. The petitions filed in the action seem to join the trustees of the Workman Trust as formal parties only. It is alleged that the trustees "are made parties as the representatives of the trust which was established for the purpose of appearing to reduce the marital estate as a part of the fraudulent scheme and device devised by the defendant, Frank M. Workman." It is further asserted that the acts of Frank M. Workman were "with the apparent acquiescence of

the defendants trustee." The allegations concerning the conspiracy, scheme, and device refer to Frank M., Lewis M., and Clara D. Workman. Nowhere is any allegation made that the trustees joined in or participated in the scheme, fraud, or conspiracy, or that they even knew of it. A personal judgment was asked against Frank and Clara Workman and the estate of Lewis M. Workman, but not against the trustees. We fail to find any allegation in the petitions on which the cause was tried that would sustain a personal judgment against them, or to apprise them that one was sought. Neither were there any such allegations in the several prior petitions. They appear to be joined for the purpose of allowing the plaintiff minors and Dellouise Workman Carroll to maintain their action as beneficiaries of the trust. The direct right to challenge the leases was in the children's corporations. The cotrustees of the Workman Trust were in the first instance the holders of the stock in the corporation and had the derivative right to bring the actions as stockholders. It was necessary for plaintiffs to allege a request and a refusal or neglect of the trustees to bring action before the plaintiffs could proceed, and the trustees as the nominal holders of the stock in the children's corporations were proper parties to the suit. They were accordingly joined as defendants but from all that appears their joinder was as nominal parties in a representative capacity. Neither does the evidence show they took part in the fraudulent scheme or even knew of it, though it shows some lack of diligence in failing to look into the affairs of the corporation whose stock they held. The action of the trial court in vacating and withdrawing the judgment against them was without error.

We find no errors in the rulings of the district court except in allowing a commission to the defendants in the amount of 10 percent of the gross rentals received under the fraudulent leases. We have allowed only 5 percent commission. We have hitherto computed the amount of half of these commissions which had been

erroneously allowed in the district court. That which should be added by reason of this court's decision, with interest to the day of the original decree, is the sum of $28,709.24, making the amount of the judgment which should have been entered as of December 30, 1960, the sum of $205,686.76.

The judgment of the district court is modified as to the amount of the judgment only, and in other respects is affirmed.

AFFIRMED AS MODIFIED.

PEP SINTON, INC., A CORPORATION, DOING BUSINESS AS MOTOR CITY, APPELLEE, V. JAMES W. THOMAS ET AL., APPELLANTS.
118 N. W. 2d 621

Filed December 14, 1962. No. 35226.

1. **Municipal Courts: Appeal and Error.** The plaintiff appealing to the district court from a judgment rendered in municipal court in favor of the defendant therein must file his petition on appeal within 50 days from the date of the rendition of judgment in the municipal court unless the district court for good cause shown shall otherwise order.
2. ———: ———. If the plaintiff in such a case fails to file his petition within the prescribed time and the district court by order overrules his motion to file the same out of time, it is the duty of the district court on motion of the defendant to enter judgment against the plaintiff as provided by section 26-1,110, R. R. S. 1943, unless the order is vacated or modified according to law.
3. ———: ———. An order of the district court overruling a motion of the plaintiff to file a petition on appeal from the municipal court after the expiration of 50 days from the judgment rendered therein, as provided in section 26-1,110, R. R. S. 1943, is a final order.
4. **Judgments.** After the final adjournment of the term of court at which a judgment has been rendered the court has no authority or power to modify the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Reversed and remanded with directions.

E. D. Warnsholz, for appellants.

Leonard Dunker and Perry & Perry, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

On June 30, 1958, plaintiff and appellee Pep Sinton, Inc., a corporation, commenced this action in replevin in the municipal court of the city of Lincoln, Lancaster County, Nebraska, against the defendants and appellants James W. Thomas and Ethel I. Thomas.

Plaintiff's affidavit in replevin sought possession of a television set and other household appliances, or the value thereof, by reason of special interest arising under a chattel mortgage securing a note originally in the sum of $1,898.70, upon which a balance of $320.69 was alleged to be due and unpaid. The defendants by counterclaim alleged the note and mortgage were null and void because of usury and prayed for a judgment of $1,610 and interest, the amount credited and paid thereon by reason of the sale of a "Simca" automobile purchased by the defendants from plaintiff and originally included in the same chattel mortgage. Answering the counterclaim, plaintiff alleged the issue in regard to usury had been previously adjudicated adversely to defendants' contention by the district court for Lancaster County, Nebraska, in an action brought by the defendants, as plaintiffs therein, subsequent to bringing the replevin action which sought to enjoin the municipal court from proceeding in the replevin suit.

The municipal court found against the plaintiff and in favor of the defendants on their counterclaim and entered judgment for the defendants in the amount of $1,887.70 and costs.

From the judgment of the municipal court the plaintiff appealed to the district court for Lancaster County, Nebraska, giving bond and filing the transcript within the proper time as provided by law. It however did not file a petition in district court within 50 days from the rendition of judgment in the municipal court on November 12, 1960.

On January 9, 1961, the defendants filed a special appearance challenging the jurisdiction of the district court over their persons because the plaintiff's petition was not on file. On January 13, 1961, the plaintiff filed a motion for leave to file its petition in replevin instanter. On January 18, 1961, the district court overruled defendants' special appearance and after a hearing thereon entered an order overruling the plaintiff's motion to file its petition out of time. From this order plaintiff neither appealed nor filed a motion for new trial. On January 19, 1961, the defendants by motion sought an order nonsuiting plaintiff and awarding judgment against it for the amount rendered by the municipal court, with interest.

At a subsequent term of the district court which commenced on January 23, 1961, the plaintiff, on February 14, 1961, made a second application to file its petition in the district court, setting up matters alleged in its former motion with some additional ones, and further elaborating thereon. No reference was made to the previous order overruling the first motion to file the petition. On the same day a hearing was had thereon and, over objections of the defendants, oral testimony was again taken with respect thereto.

On March 9, 1961, the court entered an order overruling the motion of defendants to nonsuit the plaintiff on condition the defendants' attorney be allowed $100 as attorney's fees to be taxed as costs, and permitting the plaintiff to file its petition within 10 days if $100 was paid in the meantime, otherwise the appeal was to stand dismissed. The $100 was paid and pleadings were filed

presenting the same issues as those tried in the municipal court.

On November 6, 1961, the defendants filed a motion to dismiss the plaintiff's petition in replevin, stating the order of January 18, 1961, was a final order and could not be set aside or modified by a new order at a subsequent term of court except as provided by law.

The court overruled defendants' motion and proceeded to trial. It permitted the plaintiff to dismiss its petition without prejudice and a hearing was had to the court alone on the plea of res judicata made by the plaintiff to defendants' cross-petition. It found for the plaintiff thereon and rendered judgment dismissing the plaintiff's action in replevin without prejudice, and the defendants' cross-petition with prejudice, and directing a mandate issue to the municipal court reversing that court's judgment and disposing of the matter in accordance with the judgment.

The defendants filed a motion for new trial and from the order overruling it they have appealed to this court.

Defendants have made a number of assignments of error but in view of our decision only the following need be considered. The court erred in overruling defendant's motion to nonsuit plaintiff filed on the 19th day of January 1961; in entertaining, over defendants' objection, plaintiff's second application to file its petition out of time; and in overruling defendants' motion to dismiss plaintiff's petition in replevin filed on November 6, 1961.

The consideration of the questions involved turns on the construction and application of section 26-1,110, R. R. S. 1943. The applicable portion thereof reads as follows: "* * * if the plaintiff in the action in the municipal court shall appeal from any judgment rendered, against such plaintiff, and after having filed his transcript and caused such appeal to be docketed according to the provisions of sections 26-1,104 to 26-1,117, shall fail to file his petition within fifty days from the date of the rendition of such judgment by the municipal court,

unless the court, on good cause shown, shall otherwise order, or otherwise neglect to prosecute to final judgment, the said plaintiff shall become nonsuited; and it shall be the duty of said court to render judgment against such appellant for the amount of the judgment rendered against him by the municipal court together with interest accrued thereon and for costs of suits, and to award execution therefor." This section has apparently never been construed by this court but it is substantially the same as the statute governing appeals from judgments in justice court. §§ 27-1306 and 27-1307, R. R. S. 1943. In the case of Rice v. McGrath, 162 Neb. 511, 76 N. W. 2d 428, this court in a replevin case where the appeal was from the judgment of the county court in favor of the plaintiff, affirmed the judgment of the trial court in denying the application of the plaintiff to file his petition out of time. The evidence before the district court in the cited case is outlined in that opinion and this court held the district court did not abuse its discretion in refusing to grant the plaintiff the right to file his petition and sustained the trial court in permitting the defendant to proceed with his case and prove the wrongful taking and his damages because thereof. In Hess v. Hess, 78 Neb. 347, 110 N. W. 999, the plaintiff in justice court appealed from a judgment against him on defendant's set-off. The plaintiff sought and procured an order to dismiss the action without prejudice. Upon application of the defendant without notice to plaintiff, the district court entered judgment under a similar statute. In affirming the judgment this court stated: "Plaintiff alleges error in that no notice was served upon him of defendant's application for judgment. He was not entitled to notice. Defendant's right to the judgment in such case arose by reason of plaintiff's default, and by operation of the statute. The court could have rendered such judgment had no application therefor been made."

In the case of In re Estate of Lindekugel, 148 Neb. 271,

27 N. W. 2d 169, this court stated the following rule: "When the plaintiff fails to file a petition on appeal in the district court within 50 days from the date of the rendition of the judgment in the lower court, or at any time thereafter, and good cause is not shown for failure for so doing, upon motion to nonsuit the plaintiff for such failure and no competent evidence appearing in the record to show good cause, this court will not presume such fact, and, under the circumstances, the trial court is not in error in sustaining the motion."

In the opinion last cited there is a discussion of several cases involving the failure to file a petition on time in an appeal from a judgment in justice court. From the cases cited, and the clear and unambiguous provisions of section 26-1,110, R. R. S. 1943, we believe the following rules are applicable to the case before us. The plaintiff appealing to the district court from a judgment rendered in municipal court in favor of the defendant therein must file his petition on appeal within 50 days from the date of the rendition of judgment in the municipal court unless the district court for good cause shown shall otherwise order. If the plaintiff in such a case fails to file his petition within the prescribed time and the district court by order overrules his motion to file the same out of time after a hearing, it is the duty of the district court on motion of the defendant to enter judgment against the plaintiff, as provided by section 26-1,110, R. R. S. 1943, unless the order is vacated or modified according to law.

The plaintiff urges the evidence offered in support of the motion and application was sufficient to authorize the trial court to permit the filing of its petition out of time. The defendants contend that the order of January 19, 1961, overruling plaintiff's motion to file its petition out of time was a final order from which no appeal or motion for new trial was taken and that consequently it could not be changed, modified, or vacated by any order made at a subsequent term. If such is true this

court cannot consider the evidence that was the basis of the trial court's order. The plaintiff maintains that the order was interlocutory only.

A final order is defined by section 25-1902, R. R. S. 1943, as follows: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a 'final order' which may be vacated, modified or reversed, as provided in this chapter."

In Steele v. Haynes, 20 Neb. 316, 30 N. W. 63, an order overruling an application to set aside a default was held to be a final order; and in Harman v. Barhydt, 20 Neb. 625, 31 N. W. 488, an order refusing to permit the filing of a petition in intervention was determined to be a final order. In Ribble v. Furmin, 71 Neb. 108, 98 N. W. 420, this court held: "An order of a county court refusing an application to file a claim against an estate, because presented after the expiration of the time allowed for presenting claims, is a final order from which an appeal to the district court will lie." It is obvious that an order refusing to file a belated claim ends the claimant's rights. It is equally apparent under the appeal statute involved and the cited cases interpreting it that the failure of the plaintiff to file his petition ends his rights to maintain his appeal and subjects him to being nonsuited. Either order is "an order affecting a substantial right in an action" and "in effect determines the action" and as far as the plaintiff is concerned "prevents a judgment" within the meaning of section 25-1902, R. R. S. 1943. We conclude that an order of the district court overruling a motion of the plaintiff to file a petition on appeal from the municipal court after the expiration of 50 days from the judgment rendered therein, as provided in section 26-1,110, R. R. S. 1943, is a final order.

In Meier v. Nelsen, 156 Neb. 666, 57 N. W. 2d 273, this court held: "After the final adjournment of the term

of court at which a judgment has been rendered the court has no authority or power to modify the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943."

The trial court having overruled the motion of the plaintiff to file its petition on appeal and that being a final order, it could not be vacated or modified at a subsequent term by a simple hearing of another application seeking the same relief. No steps having been taken to appeal from the order or for a new trial thereon, there is nothing before us with respect to that order.

The filing of a petition on appeal being essential to the maintenance of the plaintiff's appeal, it follows that the motion of the defendants to nonsuit the plaintiff and to enter judgment for the amount adjudged due the defendants in the municipal court with interest, as provided by section 26-1,110, R. R. S. 1943, should have been sustained and judgment rendered in the district court accordingly.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

ESTHER N. GENTRY ET AL., APPELLEES, V. STATE OF NEBRASKA, APPELLANT, IMPLEADED WITH THE SUPERIOR OIL COMPANY, A CORPORATION, APPELLEE.

118 N. W. 2d 643

Filed December 14, 1962. No. 35255.

1. **Constitutional Law.** Article V, section 22, Constitution of Nebraska, is not self-executing. Legislative action is necessary to make it available.
2. **States.** Section 24-319, R. R. S. 1943, covers all the various claims and demands on which the state may be sued.
3. **Constitutional Law.** Article I, section 21, Constitution of Nebraska, is self-executing and legislative action is not necessary to give it effect.

4. **Eminent Domain.** If plaintiffs' property has been damaged for public use, they are entitled to compensation.
5. **Limitations of Actions.** The 1-year statute of limitations applicable to actions for libel and slander is equally applicable to actions for slander of title.
6. **States.** The consent of the state to be sued is a limited consent and cannot be broadened by broad equitable principles.
7. **Statutes: States.** Statutes authorizing suits against the state are to be strictly construed.
8. **States.** The state, as trustee of public property and funds, cannot be sued without its consent.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and dismissed.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellant.

Lovell & Raymond and Atkins, Ferguson & Nichols, for appellees Gentry et al.

Wright, Simmons & Hancock, for appellee Superior Oil Co.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a proceeding in equity brought by Esther N. Gentry and Julia Joyce Brashear, hereinafter designated as plaintiffs, embracing two causes of action. The defendants are the State of Nebraska, hereinafter designated as State, and The Superior Oil Company, a corporation, hereinafter referred to as Superior.

The first cause of action seeks to quiet title in the plaintiffs to certain mineral rights under land owned by the plaintiffs. The second cause of action is for an accounting of rents and profits received by the State under a purported oil lease from Superior. The State demurred to both causes of action. The demurrer was overruled, and the State answered as to the first cause of action and elected to stand on the demurrer as to the second cause of action. Superior filed a motion for summary

judgment as to the second cause of action which was sustained and it was dismissed from the action. The plaintiffs filed a motion for summary judgment on both causes of action, which was sustained. Title to the mineral rights was quieted in the plaintiffs, as prayed in the first cause of action. Judgment was entered on the second cause of action against the State in the amount of $8,320. The State has perfected an appeal directed only to the judgment entered on plaintiffs' second cause of action.

By contracts dated June 6, 1917, the State of Nebraska sold Section 16, Township 20 North, Range 54 West of the 6th P. M., in Scotts Bluff County, Nebraska. These contracts contained a mineral rights reservation. On February 11, 1919, the amounts due on the contracts were fully paid and the land was conveyed without the mineral rights reservation. Through mesne conveyances each of the plaintiffs became the owner of an undivided one-half interest in said property. On July 9, 1956, the Board of Educational Lands and Funds leased the mineral rights to Superior for a primary term of 10 years with delay rentals in the amount of $1,664 per year. Up to the time of this action Superior had paid delay rentals to the State in the amount of $8,320. This is the exact amount of the judgment entered against the State on plaintiffs' motion for summary judgment on its second cause of action. As suggested, this appeal is limited to the judgment on plaintiffs' second cause of action.

The principal question presented and the only one briefed or argued by the State is whether the district court had jurisdiction of plaintiffs' second cause of action.

Article V, section 22, Constitution of Nebraska, provides: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought." This provision permits the state to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may

prescribe. This provison of the Constitution is not self-executing. Legislative action is necessary to make it available. See State ex rel. Davis v. Mortensen, 69 Neb. 376, 95 N. W. 831.

Pursuant to this provision, the Legislature has enacted what is now section 24-319, R. R. S. 1943, which, so far as material herein, reads as follows: "The several district courts of the judicial districts of the state shall have jurisdiction to hear and determine (1) all claims against the state filed therein which have previously been presented to the Auditor of Public Accounts, and have been in whole or in part rejected or disallowed; (2) all claims or petitions for relief that may be presented to the Legislature, and which may be by any law, or by any rule or resolution of the Legislature, referred to either of said courts for adjudication; (3) all set-offs, counterclaims and claims for damages, liquidated or unliquidated, on the part of the state against any person making a claim against the state, or against the person in whose favor such claim arose; (4) all cases where the State of Nebraska shall have a lien or any other interest, apparent or real, upon or in any real estate in said state, wherein any party may desire to have said lien or interest of the state fixed and determined or foreclosed and cut off; and permission is hereby given to any party to join the state as a party in any such actions or proceedings in such courts involving real estate in or upon which the state has, appears to have, or claims any interest or lien; * * *." The last, or fifth, classification clearly could not be material or applicable herein, and so is not set out.

It is evident that the plaintiffs' second cause of action, whether it is one for an accounting or for damages, does not fall within the five enumerated classifications set out in the statute. The first provision requires the presentation of a claim to the Auditor of Public Accounts. This has not been done. The second covers claims presented to the Legislature. This claim has

never been presented to the Legislature. The third provision covers claims for damages on the part of the state, which obviously this is not. The fourth provision involves situations where an attempt is made to determine, foreclose, or cut off a lien. Plaintiffs' first cause of action, which is not involved in this appeal, falls within that classification, but their second cause of action does not. The fifth classification involves bonds or obligations of political subdivisions and is not remotely involved.

In State v. Stout, 7 Neb. 89, this court held that the above statute "* * * includes all the various claims and demands on which the state may be sued * * *." See, also, State ex rel. Davis v. Mortensen, 69 Neb. 376, 95 N. W. 831, and citations set out hereinafter on strict construction.

It being quite evident that the action at bar is not within any of the classifications mentioned in the statute, the district court had no jurisdiction of the second cause of action unless for some reason the constitutional provision involved is not the controlling one. Plaintiffs seek to avoid its operation on the theory that this action is controlled by Article I, section 21, Constitution of Nebraska, which prohibits the state from taking or damaging property for public use without just compensation. We have held that this constitutional provision (Article I, section 21) is self-executing and that legislative enactment is not necessary to give it effect. Schmutte v. State, 147 Neb. 193, 22 N. W. 2d 691.

The material allegations of plaintiffs' petition are the following: "* * * that by reason of the aforesaid lease, the defendants have wrongfully encumbered plaintiffs' aforesaid mineral interest so as to discourage any other person or persons, firms or corporations from entering into a valid oil and gas lease with the plaintiffs; that the reasonable rental value of the plaintiffs' aforesaid mineral interest in, on and under Section 16, Township 20 North, Range 54, West of the 6th P. M., Scotts Bluff

County, Nebraska, since January 9, 1956, has been at least $1,664.00 per year, and that plaintiffs have been damaged because of the aforesaid void oil and gas lease entered into between the defendants, and that the defendants should be required to account to the plaintiffs for all rents and profits paid and received as a result of said void oil and gas lease, * * *."

It seems apparent that plaintiffs' petition does not allege any taking of property, and none seems to be involved. For Article I, section 21, Constitution of Nebraska, then to be applicable, the jurisdiction must be based upon damage to the property. There is no question, if plaintiffs' property has been damaged *for public use,* they are entitled to compensation. Gledhill v. State, 123 Neb. 726, 243 N. W. 909.

Plaintiffs in their brief state as follows: "* * * appellees' second cause of action is an action to recover damages sustained and an accounting for rents and profits wrongfully received by the Board of Educational Lands and Funds by reason of the unlawful and unauthorized use of appellees' mineral rights without just compensation." The prayer of plaintiffs' petition was not for damages but that the defendants be required to account to the plaintiffs for all rents and profits paid as a result of said lease.

The only allegation in plaintiffs' motion for summary judgment applicable to the second cause of action is paragraph 3 of their motion, which is as follows: "That as to the second cause of action, the plaintiffs are not requesting that the Court enter any judgment against the defendant, The Superior Oil Company, a corporation, excepting only insofar as the plaintiffs are praying that the Court enter an Order determining that the delay rentals in the total amount of $8,320.00 heretofore paid by the defendant, The Superior Oil Company, a corporation, to the defendant, State of Nebraska, constitute rents and profits received by the defendant, State of Nebraska, and in its possession, to which the plaintiffs are entitled

pursuant to the oil and gas lease entered into between the defendants which wrongfully encumbered plaintiffs' property."

As we interpret the allegations of plaintiffs' petition set out herein, they are seeking an accounting for rents received by the State on the assumption that damage is apparent and that they are entitled to the benefits of the lease. We find no allegation, and certainly there is no showing, that plaintiffs' property has been damaged for public use. This clearly would be a type of action involving Article V, section 22, rather than Article I, section 21, Constitution of Nebraska.

Plaintiffs' allegation of damage is a general statement and appears to be restricted to the allegation that the State has wrongfully encumbered plaintiffs' mineral interest. If we consider this as an action for damages for wrongfully encumbering plaintiffs' title, we have a slander of title action. While there may be a question as to whether this is a true slander of title action because no false and malicious statement is alleged, it is analogous to Norton v. Kanouff, 165 Neb. 435, 86 N. W. 2d 72, which we held to be a slander of title action. In that case we held: "The 1-year statute of limitations applicable to actions for libel and slander is equally applicable to actions for slander of title." In the case at bar, the affidavit of one of the plaintiffs states that she knew of the lease in July of 1959. The affidavit of the other plaintiff is substantially to the same effect. This action was not filed until March 24, 1961, or 1 year and 8 months after the lease had come to plaintiffs' knowledge. Consequently, the action was filed too late and would be subject to demurrer.

If we were to find the district court had jurisdiction of plaintiffs' second cause of action, which we do not, there is a very cogent reason why the summary judgment herein cannot stand. There is no evidence in this record as to the amount of damages sustained by plaintiffs. None of the pleadings or affidavits set out the

actual damage alleged to be sustained. There is no showing that Superior ever did more than file the lease for record. The plaintiffs have proceeded herein on the theory that whatever the State collected is their damage, but have urged no reasons why this would be so. The trial court accepted this theory and entered a summary judgment for the exact amount of the delay rentals, $8,320.

On what theory can we hold, without proof of actual damage, that plaintiffs were damaged in exactly the amount of the delay rental paid the State by Superior? Was the transaction handled without expense to the State? Does Superior have a claim against the State for these payments? If the State had no right to lease the property, what did Superior receive for its delay rental payments? Certainly the interests of the plaintiffs in the mineral rights were not conveyed to Superior. How much of the delay rental payment is consideration for the right to continue the lease for the remaining 5 years of its term? These questions do not need to be answered herein, but they serve to point up the fallacy of assuming plaintiffs' damage to be the delay rental payments. It should be apparent that if the stage for proof of damages is ever reached, it would require the introduction of evidence to prove the actual damage.

Plaintiffs also argue that where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all purposes. The State concedes the first cause of action was within the statute, therefore plaintiffs insist the court had jurisdiction of the second cause of action. Our obvious answer to this argument is that the consent of the State is limited and cannot be broadened by broad equitable principles. In Frye v. Sibbitt, 145 Neb. 600, 17 N. W. 2d 617, we said at page 610: "Statutes authorizing suits against the state are to be strictly construed. In Anstine v. State, 137 Neb. 148, 288 N. W. 525, this court quoted with approval the following from 59 C. J., sec. 460, p. 303: '* * * it is usually said that

statutes authorizing suit against the state are to be strictly construed, since they are in derogation of the state's sovereignty. * * *.'"

To permit the use of broad equitable principles to avoid this rule would, borrowing the language found at page 153 of Anstine v. State, 137 Neb. 148, 288 N. W. 525, on another point, "* * * operate to encroach upon the state's sovereign rights, injuriously affect its capacity to perform its functions, and would establish a right of action against it in the manner which should not be permitted."

The brief of amicus curiae argues that the State, in its capacity of trustee of school funds, is a different entity from its sovereign capacity. It contends that the State, as a trustee, should be subject to the same procedural statutes, etc., as other trustees and should not be immune from suit or protected from suit as a sovereign. A sufficient answer to this argument is found in State ex rel. Walker v. Board of Commissioners, 141 Neb. 172, 3 N. W. 2d 196, in which we said: "The state as trustee of public property and funds cannot be sued without its consent."

For the reasons set out above, we find that the judgment entered for the plaintiffs against the State on the second cause of action should be vacated, and that the demurrer of the State to plaintiffs' second cause of action should be sustained and plaintiffs' second cause of action dismissed.

REVERSED AND DISMISSED.

THOMAS R. MAIN, APPELLANT, V. HULDA SORGENFREI, APPELLEE.
118 N. W. 2d 648

Filed December 14, 1962. No. 35256.

1. **New Trial: Appeal and Error.** If the trial court gave no reasons for its decision in sustaining the motion for new trial,

then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error.

2. ———: ———. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court.
3. ———: ———. The appellant then in reply has the right, if he desires, of meeting this contention.
4. ———: ———. On review in this court of an order granting a new trial, there is no burden in the sense of a burden of proof upon either party.
5. ———: ———. The burden is upon both parties to assist the court to a correct determination of the question or questions presented.
6. Trial: Evidence. It is the rule in this jurisdiction that physical facts may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted fact question, unless they are demonstrable to a degree that reasonable minds cannot disagree concerning their existence, and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics, or mathematics.
7. ———: ———. Where there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury.
8. ———: ———. It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses.
9. Trial. In a case where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury.
10. Negligence. If, on the trial of an action brought to recover damages for injuries to a person or to his property caused by the negligence of another, plaintiff is found to be guilty of negligence directly contributing to the injury complained of, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any

degree that which, under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff, however slight, will defeat a recovery. And even when plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of damage sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained.

11. **Trial: Damages.** It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict, otherwise the jury may be confused and misled.

12. ———: ———. In an action for damages it is the duty of the court to instruct the jury as to the proper measure of recovery. The tendering of a proper instruction is not a condition precedent to the assignment as error of an erroneous instruction on the measure of damages.

13. ———: ———. Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required since a remittitur would amount only to a substitution of the judgment of the court for that of the jury.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Richard A. Dier and S. Bruce Barton, for appellant.

Tye, Worlock & Knapp, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is an action at law brought by Thomas R. Main, plaintiff, against Hulda Sorgenfrei, defendant, to recover property damage to the plaintiff's "auto car tractor" which was pulling a Trailmobile trailer, hereinafter referred to as the plaintiff's truck, or truck, and for personal injuries and loss of profits sustained by the plaintiff when his truck collided with a 1958 Chevrolet automobile driven by the defendant. Trial was had to a

jury resulting in a verdict for the plaintiff in the amount of $24,638.50. The defendant filed a motion for new trial which was sustained. Judgment on the verdict was set aside and new trial granted the defendant by the trial court. The plaintiff perfected appeal to this court.

The plaintiff's petition alleged in substance that on March 28, 1960, at approximately 8:35 a.m., the defendant was driving a 1958 Chevrolet sedan in a westerly direction on U. S. Highway No. 30, 1.2 miles west of Grand Island, and at the same time the plaintiff, a self-employed truck driver, was driving his 1960 truck in an easterly direction on said highway and was in the eastbound or south lane of traffic; and that the defendant, while attempting to pass another vehicle, negligently and carelessly permitted the rear part of her automobile to skid to the left and across the centerline of the wet highway so that her automobile, proceeding on the diagonal in a westerly direction, collided with the plaintiff's truck. The plaintiff alleged that the negligent acts and omissions of the defendant were as follows: That the defendant failed to keep her automobile under proper control; that the defendant attempted to overtake and pass another vehicle proceeding in the same direction, by driving on the left side of the centerline of the highway when the left side of the highway was not free of oncoming traffic for a sufficient distance to permit the overtaking and passing of the vehicle without interfering with the safe operation of a vehicle approaching from the opposite direction; that the defendant failed to drive the automobile she was operating on her right half of the highway; that the defendant failed to pass the truck operated by the plaintiff which was coming from an opposite direction to her right; and that the defendant failed to give the truck operated by the plaintiff at least one-half of the traveled portion of the highway, though the truck driven by the plaintiff and the automobile driven by the defendant were proceeding in opposite directions. The plaintiff further alleged that as a proxi-

mate result of the negligent acts and omissions on the part of the defendant, the plaintiff's truck was damaged to the extent that the fair and reasonable cost of repairing said damage and restoring the truck to approximately the same condition it was in prior to the accident, would amount to $889.91. The plaintiff further alleged that he was thrown about in the cab of his truck and as a result suffered personal injuries which caused him mental pain and anguish, physical pain, and necessitated reasonable expenses for medical care and treatment in the amount of $486.50; that the plaintiff will in the future suffer disability, mental pain and anguish, as well as physical pain; and that as a result thereof he has been damaged in the total amount of $20,486.50. The plaintiff further alleged that as a result of the negligent acts and omissions of the defendant, and as a result of the personal injuries sustained by him, he was disabled and unable to operate his truck from the date of the accident until August 6, 1960, and thereby suffered damages in the amount of $3,262.15. The plaintiff prayed for judgment against the defendant in the amount of $24,638.56.

The defendant filed an amended answer and cross-petition, admitting the occurrence of the collision between her automobile and the plaintiff's truck at the time and place alleged in the plaintiff's petition. The defendant alleged that the collision was solely and proximately caused by the negligence of the plaintiff; and that the plaintiff was guilty of negligence in the following particulars: That the plaintiff was operating his truck at a rate of speed in excess of that which was reasonable and proper having regard for the special hazards then existing by reason of the condition of the weather and the highway; that the plaintiff failed to decrease the speed of his truck in order to avoid colliding with the automobile of the defendant; that the plaintiff failed to decrease the speed of his truck when special hazards existed with respect to other traffic on the highway by reason of weather conditions; that the plaintiff was op-

erating his truck without lighted lamps when there was not sufficient light, because of conditions of fog then existing, to render clearly discernible persons or vehicles upon the highway; that the plaintiff failed to drive his truck on his right side of the highway; that the plaintiff failed to pass the automobile operated by the defendant, which was coming from the opposite direction, to the plaintiff's right; that the plaintiff failed to give the automobile operated by the defendant at least one-half of the main-traveled portion of the highway, though the defendant's automobile and the plaintiff's truck were proceeding in opposite directions; that the plaintiff failed to apply his brakes, if any, in order to stop his truck before colliding with the automobile operated by the defendant; and that the plaintiff failed to turn, or make any attempt to turn, his truck aside in order to avoid colliding with the automobile being operated by the defendant. The defendant further alleged that the negligence of the plaintiff was more than slight in comparison with the negligence, if any, of the defendant.

For her cross-petition the defendant alleged that as a direct and proximate result of the negligence of the plaintiff the defendant's automobile was damaged; and that the fair and reasonable cost for repairing of such damages amounted to $845.64, for which amount the defendant prayed judgment.

The plaintiff's reply to the defendant's amended answer and cross-petition denied each and every allegation therein contained except those specifically admitted.

"If the trial court gave no reasons for its decision in sustaining the motion for new trial, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant

then in reply has the right, if he desires, of meeting this contention. * * * On review in this court of an order granting a new trial, there is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented." Biggs v. Gottsch, 173 Neb. 15, 112 N. W. 2d 396.

The evidence shows that the plaintiff was driving a 1960 model "auto car tractor," which was pulling a 1959 Trailmobile trailer. The tractor was 192 inches long, and the trailer was 8 feet wide, approximately 9 feet high, and 36 feet in length. There were 16 wheels on the plaintiff's equipment which were equipped with brakes. The truck was loaded with wheat at the time of the accident and weighed a little over 47,000 pounds. The defendant's automobile was a 1958 Chevrolet with four doors.

U. S. Highway No. 30, at the place of the collision, was flat and level, 27 feet wide, and paved with black-top. Each driving lane was approximately 13½ feet wide.

The damage to the plaintiff's equipment consisted of dents in the cab and in the trailer. The top of the trailer was in bad condition. The left front fender had a piece torn out of it, and it was cracked. The bumper cut into a tire. The steering mechanism was broken. The damage to the defendant's automobile showed that it had been hit on the left back wheel and fender. The fender was scraped and pushed over, and the trunk was jammed. The rear window was broken. The cost of the repair of the plaintiff's equipment was $889.91, and the cost of the repair of the defendant's automobile was $845.64.

It was stipulated that on March 28, 1960, the time of sunrise was 6:24 a.m., but not that the sun did rise at that time on that date.

The plaintiff's evidence is to the effect that he was 64 years of age at the time of trial, a resident of Sutherland, Nebraska, and that he made his living by trucking

and in the grain business. On the day of the accident he was driving his truck, which was in good mechanical condition. He left Sutherland between 2 and 3 a.m., and was proceeding to Lincoln. He and his son, the latter driving his own outfit, stopped at Kearney for breakfast. The plaintiff stopped at Alda to permit his son to catch up with him. From the time the plaintiff left North Platte there had been intermittent fog. At Alda the fog had lifted, and from there on to Grand Island it was cloudy. It was hazy, but visibility was from half a mile to a mile. The highway was wet, but not slippery. The plaintiff estimated that he was from 100 to 200 yards from the defendant's automobile when he first saw it. At that time he was in his own lane of traffic. He did not continue to watch it. The plaintiff estimated the speed of his truck to be between 40 and 45 miles an hour. After the plaintiff first saw the defendant's automobile it appeared a second time attempting to pass a pickup truck and was between 70 and 75 feet in front of him. It seemed to spin and cross over into the plaintiff's lane of traffic, and then the collision occurred. The plaintiff was thrown into the steering wheel and lost control of his truck. The tractor portion seemed to stop and swing to the north. It went clear around until it hit the side of the trailer portion of the truck. The trailer went directly down the south lane of the highway. The rear wheels of the tractor went off of the pavement to the south, and the tractor was headed in a northwesterly direction. There were four marks behind the trailer, made by dual wheels, which were 35, 40, or possibly 60 feet behind the trailer and ended where the trailer stopped. There was dirt 2 or 3 feet south of the centerline of the highway, also windshield glass and taillight glass in the south traffic lane. The clear glass was scattered over a large part of the highway, but the bulk of it was in the south traffic lane. It was suggested that the truck be moved, because of traffic on the highway. The plaintiff was unable to move the truck because the

brakes were locked and the steering mechanism broken. However, the truck was finally moved. The plaintiff made a report to a patrolman, and was present when the defendant made her report. The plaintiff heard the defendant tell the patrolman that she had pulled out to pass a pickup truck which was in front of her, and when she attempted to pass she lost control of her automobile. She also said she thought she would have to quit driving. On cross-examination the plaintiff testified that he did not have the lights turned on on his truck; that the first time he saw the defendant's automobile it was coming toward him; and that he did not remember reducing his speed, but he might have taken his foot off the accelerator.

The plaintiff's son testified that he owned his own truck; that he was traveling a short distance behind his father; that as they traveled east the fog became lighter; and that at the place of the accident the visibility was clear for three-fourths of a mile. He further testified that he saw the defendant's car sliding sideways. At that time he was 100 to 150 yards behind his father's truck. The defendant's automobile was sliding forward right into the front of his father's truck. The next thing he knew the plaintiff's truck was jackknifing, and the defendant's automobile went off to the edge on the north side of the highway. The plaintiff's truck proceeded east until it stopped on the south side of the highway with the front end of the tractor on the centerline. The defendant's automobile stopped right next to the centerline of the highway in its lane of traffic. Its front wheels might have been along the edge of the white centerline, west of the plaintiff's truck a little way. This witness observed the broken glass, dry dirt, and debris in the south lane, 2 or 3 feet south of the centerline of the highway. This witness further testified that he heard the defendant say to the patrolman that she lost control of her automobile and guessed she was going to have to quit driving. This witness noticed four tire

marks left by dual wheels, which began a little way east of the defendant's automobile.

A member of the Nebraska Safety Patrol investigated the accident. The plaintiff's truck and the defendant's automobile had been moved. He talked to the defendant who told him that she was westbound and was attempting to pass a truck; and that she did not see the truck coming from the west until it was too late, and she tried to get back into her own lane of traffic but did not make it in time. He observed a lot of broken glass, mud, and debris from the two vehicles and some skid marks on the highway. The skid marks were apparently made by a truck with dual wheels. These skid marks were just south of the centerline of the highway. The largest concentration of mud and debris was approximately 2 or 3 feet south of the centerline of the highway. On cross-examination this witness testified that the weather was foggy when he arrived at the scene of the accident, and this would hamper the vision of drivers at times.

The defendant's testimony was to the effect that she lived east of Grand Island on a farm; that on the morning of the accident she got her daughter Billie Joy up at 7:30 a.m., to take her to college; that her automobile was in good mechanical condition; that it was a dreary morning and the sun was not shining; that she turned her lights on and kept them on all the time because the vehicles she met on the highway had their lights on; and that before she arrived at Grand Island there was fog, but she could see through the fog due to the lights on the automobiles. However the fog did not hamper her visibility because there was just a small amount of it. She first saw the plaintiff's truck when she got along beside the pickup truck. When she was behind the pickup she was traveling 45 miles an hour and speeded up to 50 miles an hour to pass the pickup when she saw the plaintiff's truck which did not have its lights on. Her daughter said: "Mom, it's a truck." She was in her own lane of traffic when she got hit. She did not go

onto the south side of the highway after getting behind the pickup. She further testified that her automobile did not slide sideways, nor did she lose control of the automobile; that her automobile stopped in her lane of traffic on the north side of the highway; that the plaintiff's truck came to rest on the north side of the highway; that the truck jackknifed with the trailer on the north side of the white line of the highway; and that she was on her own side of the highway when she got hit. The defendant denied that she told the patrolman that she lost control of her automobile. On cross-examination this witness testified that the tractor was over on the white line of the highway toward the north.

The defendant's daughter testified that the defendant started to pass the pickup, this witness remarked that there was a truck coming, and her mother pulled in behind the pickup truck. This witness remarked that she thought they were clear, and shortly after that there was the impact. This witness further testified that the defendant's automobile was brought to a stop on the north side of the highway; that she was sure the defendant's automobile was on the north side of the highway at the time of the impact; and that the defendant did not tell the patrolman that she lost control of her automobile, but did comment that she would have to quit driving.

The defendant's husband testified that he received word of the accident about 9 a.m., and went to the scene of the accident. Automobiles had their lights on, because the fog was heavy. He saw a skid mark north of the center of the highway and inquired of the patrolman as to it, and the patrolman did not know just how the skid mark happened to be there.

The plaintiff contends that the physical facts, as well as all of the facts in this case, are sufficient to warrant the trial court to direct a verdict in favor of the plaintiff.

"It is the rule in this jurisdiction that physical facts

may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted fact question, unless they are demonstrable to a degree that reasonable minds cannot disagree concerning their existence, and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics, or mathematics." Biggs v. Gottsch, *supra*. See, also, Jones v. Union P. R. R. Co., 141 Neb. 112, 2 N. W. 2d 624; Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651.

Where there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury. See Biggs v. Gottsch, *supra*.

It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses. See Biggs v. Gottsch, *supra*.

"In a case where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury." Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12.

In the instant case there is a conflict in the evidence with reference to the condition of the weather and the extent of visibility of the drivers of the vehicles here involved. There is a conflict in the evidence as to whether the actual impact or collision between the plaintiff's truck and the defendant's automobile occurred on the south side of the centerline of U. S. Highway No. 30, or on the north side thereof. There is evidence that a considerable portion of the 192-inch tractor of the plaintiff's vehicle came to rest in the north lane of traffic. There was a skid mark and some debris on the north side of the centerline of the highway. There is a question as to

whether or not the plaintiff should have done something to alter the course of his truck or decrease his speed prior to the accident, as the evidence indicates he might have had time to do so. We conclude that the trial court did not commit prejudicial error in submitting the case to the jury.

The defendant attacks certain instructions given by the trial court. First, the defendant contends that instruction No. 7, relating to the comparative negligence rule, was fatally defective. The portion of the instruction referred to is as follows: "If you find that both plaintiff and defendant were guilty of negligence and that such negligence was the proximate cause of the damages to the plaintiff and you further find that the negligence of the plaintiff was more than slight when compared with the negligence of the defendant, then the plaintiff cannot recover. But if you find from the evidence that the negligence of the plaintiff was only slight when compared with the negligence of the defendant, then the plaintiff con (sic) recover but in such case the amount of his recovery must be diminished by such an amount as the contributory negligence of the plaintiff bears to the entire negligence as shown by the evidence and the verdict would be for the balance only."

The reason given by the defendant is as follows: The instruction failed to include or embody in any way any reference to what the jury might find if the negligence of the defendant fell in any degree short of gross negligence.

In the case of Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158, this court said: "The true rule is that, if plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith. If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any

degree that which under the circumstances amounts to slight negligence, *or if the negligence of defendant falls in any degree short of gross negligence under the circumstances,* then the contributory negligence of the plaintiff, however slight, will defeat a recovery. And even when plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of damage sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained." (Emphasis supplied.)

The above rule has been continuously accepted by this court from the time of its inception to the present time.

In Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246, on page 655, the case of Morrison v. Scotts Bluff County, *supra,* is cited, and a part of the comparative negligence rule is stated in the opinion, specifically the language which does not appear in the trial court's instruction No. 7 complained of by the defendant which is a part of the rule announced by this court. See, also, Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

In Mitchell v. Missouri P. R. R. Corp., 114 Neb. 72, 206 N. W. 12, it is said: "The trial court attempted to cover this subject in the giving of instructions * * *. In these instructions however the element referred to in the following language: 'Or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff, however slight, will defeat a recovery' is wholly omitted. In instruction * * * requested by defendant in the court below and refused this element was substantially covered. The failure of the court to embody in his instructions the element above quoted thus constitutes error."

In Ripp v. Riesland, *supra,* the court discussed the case of McMullen v. Nash Sales Co., 112 Neb. 371, 199 N. W 721. The court said: "The omission of the element: 'or if the negligence of defendant falls in any

degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery' from the instruction in McMullen v. Nash Sales Co., *supra,* would not seem to be any more fatal than the omission of the element: 'deceased's negligence was more than slight or' from the instruction in this case. The omission discussed above was an error and was prejudicial * * *."

A proper instruction under the comparative negligence statute requires the instruction to embody or contain both elements with reference to slight negligence of the plaintiff or negligence less than gross on the part of the defendant. The instruction in the instant case does not contain or embody any reference to negligence less than gross on the part of the defendant. The omission of the phrase above set forth in instruction No. 7, under the authorities above cited, constitutes prejudicial error.

The defendant predicates error on the giving of instruction No. 13 by the trial court, which is in part as follows: "In determining the amount of plaintiff's recovery, in the event you find for the plaintiff, you will consider the nature and extent of the injuries suffered by the plaintiff and whether such injuries are permanent, the pain endured by him, if any, as the result of such injuries, and the expenses incurred for hospitalization, medical care and drugs and the fair and reasonable cost of repairs to plaintiff's vehicle. * * * In determining the damages the plaintiff may be entitled to for his physical pain and suffering, it is not necessary that any witness should have expressed an opinion thereon. The law has no standard for compensating for physical pain and suffering. It is left to the cound (sic) discretion of the jury upon consideration of all the evidence in the case, but such discretion is not to be exercised in an arbitrary manner and you have no right to award anything in the nature of punishment."

The defendant asserts that nowhere in the instruction

did the trial court indicate to the jury that damages for permanent injuries cannot be based upon speculation, probability, or uncertainty, but must be based upon competent evidence of permanent damages clearly shown, or reasonably certain as a proximate result of the injury. With reference to the statement as to speculation, probability, or uncertainty, while such language may be found in instructions on the measure of damages, its omission is ordinarily not considered prejudicial error.

The defendant asserts that paragraphs VI and VII of the plaintiff's petition contain allegations of damages with reference to past and future disability and lost profits; and that on the trial of the case the trial court sustained objections on the part of the defendant to offers made by the plaintiff of amounts of money made by the plaintiff during the months of April, May, June, and July 1960, then allowed the plaintiff, over objection, to introduce testimony of wages paid a substitute driver during the same months. Although the plaintiff stated that he was still making his living in the trucking business, the trial court allowed the plaintiff's son to testify, over objection by the defendant, that a full-time operator in the trucking business draws in the neighborhood of $4,500 to $6,000 a year, and would make a minimum wage of $400 a month. The defendant asserts that such evidence raised the issue of the loss of future earnings on the part of the plaintiff, and that it was the duty of the trial court to instruct the jury as to the proper basis upon which damages were to be estimated. The following are applicable.

"It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which they should take into consideration in arriving at their verdict, otherwise the jury may be confused and misled." Kroeger v. Safranek, 161 Neb. 182, 72 N.

W. 2d 831. See, also, Linch v. Hartford Fire Ins. Co., 138 Neb. 110, 292 N. W. 27, 129 A. L. R. 1063; Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643.

In Singles v. Union P. R. R. Co., 173 Neb. 91, 112 N. W. 2d 752, this court said: "In an action for damages it is the duty of the court to instruct the jury as to the proper measure of recovery. The tendering of a proper instruction is not a condition precedent to the assignment of an erroneous instruction on the measure of damages."

From a review of the pleadings and the evidence, we conclude that the trial court erred in not giving a proper instruction on the measure of damages.

The plaintiff filed an offer of remittitur in this court stating that the plaintiff failed in proof of special damages, having had admitted by the court for special damages only the sum of $2,483.12; and that the verdict of the jury exceeded such damages as prayed and proven by the amount of $2,155.38, which sum the plaintiff offered voluntarily as a remittitur in this court.

The verdict of the jury in the instant case was in the amount of $24,638.50. The plaintiff's petition prayed for damages in the amount of $24,638.56. The verdict of the jury was 6 cents less than the amount prayed for by the plaintiff in his petition.

In Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643, this court concluded that if there was no method by which a court could rationally ascertain the extent of the excess of a verdict, a remittitur could not be required, for the reason that under such circumstances a remittitur was nothing more than a substitution of the judgment of the court for that of the jury. This principle has been adopted and followed consistently by this court at least since 1943.

In the instant case this court cannot rationally ascertain the extent of excess, therefore, the remittitur offered by the plaintiff should be rejected.

Attention will be given only to the contention that

the verdict and judgment should be vacated on the ground that the verdict appears to be the result of passion and prejudice.

"It is a well-established principle of law that where a verdict in a personal injury case is excessive and that it appears to have been returned under the influence of passion and prejudice rather than upon the facts or that the jury misapplied the law, it is the duty of this court to set the verdict aside and grant a new trial." Peacock v. J. L. Brandeis & Sons, *supra*.

There is considerable evidence in the record relating to personal injuries sustained by the plaintiff, and there is a conflict in the evidence with reference to the extent of such injuries which we deem unnecessary to discuss in the light of our conclusion.

For the reasons given in this opinion, we conclude that the trial court did not commit prejudicial error in granting a new trial. The judgment of the trial court is affirmed.

AFFIRMED.

JAMES F. O'NEILL ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

118 N. W. 2d 616

Filed December 14, 1962. No. 35277.

1. **Eminent Domain: Evidence.** In a condemnation action witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted.
2. ———: ———. In a condemnation action the condition of the property, its surroundings, and its availability for any particular use may be shown, and if it has any peculiar adaptation which adds to its value the owner is entitled to the benefit thereof.
3. ———: ———. Evidence of the price at which other lands have been sold is admissible in condemnation proceedings on the question of damages where such evidence is predicated upon

sufficient foundation to furnish a criterion for market or going value of land condemned.

4. **Eminent Domain: Appeal and Error.** In a condemnation action when the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong.
5. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Asa A. Christensen, and Willis L. Strong, for appellant.

Webb, Kelley, Green & Byam, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action growing out of an award of the appraisers appointed by the county judge of Douglas County, Nebraska, wherein in an action for condemnation of real estate instituted by the State of Nebraska, Department of Roads, lands of James F. O'Neill and Lorraine O'Neill were condemned, appraised, and the valuation fixed.

James F. O'Neill and Lorraine O'Neill as plaintiffs appealed to the district court for Douglas County, Nebraska, on the ground that the valuation fixed was insufficient. There were other parties plaintiff but they have no interest in the action at this time. The O'Neills will be referred to hereinafter as plaintiffs. The State of Nebraska, Department of Roads, was defendant, and for the purposes of this opinion will be so referred to.

A trial was had to a jury in the district court and a verdict was returned in favor of the plaintiffs for $59,780. The appraisal from which the appeal had been

taken was $45,500. Judgment was rendered on the verdict and thereafter a motion for new trial was filed by the defendant. This motion was overruled. From the judgment and the order overruling the motion for new trial the defendant has appealed.

The brief of the defendant contains six assignments of error. These assignments interrelatedly present the subject of admissibility and weight of evidence. In other words the only questions involved on this appeal are related to admissibility and sufficiency of evidence.

The original proceeding was instituted February 25, 1960, to condemn totally a rectangular tract of land containing 28 acres. It extends about 870 feet north and south on the east side of Sixtieth Street, a street which extends southward from the city of Omaha along the west side of this area, and about 1,400 feet to the eastward. It is bounded on the south by the Union Pacific Railroad right-of-way and tracks. It is bounded on the north and east by properties variously classified not necessary to describe here. Descriptions of the topography appear in the evidence but it is not deemed necessary to set these out here. The land was at the time of the taking used for pasture and the production of crops, except about nine acres in the northwest corner which were used as a cattle feeding lot. The entire area was zoned by the city of Omaha, Nebraska, as second suburban. The record does not contain an authentic description of use of a second suburban area, but there is an accord that such an area is not zoned for industrial or residential uses but that it is an area within the zoning power of the city without a specifically described purposeful use. One witness described it as a residual or a holding zone territory. A witness testified in effect that such a zone must be within 3 miles of the city limits. This is not disputed.

As pointed out this case was tried to a jury and the plaintiffs called two witnesses each of whom gave his opinion as to the value of this property at the time of

condemnation. Each testified that it had a value of $77,000. The ability, capacity, and competency of these witnesses to testify as to value has at no place in the record been questioned. No objection as to the admissibility of the testimony at the time it was given appears.

Each of these witnesses was a man of extensive experience and knowledge in the fields of appraisal and valuation of real estate and in particular in the city of Omaha and its environs. The record discloses that in arriving at his opinion as to the value testified to, each of them took into consideration the location of the area, its size, depth, width, topography, trends in development in the direction of this real estate, the trends in industrial and residential growth and use, and potential for early use for these purposes. They also took into consideration, as the record discloses, their knowledge as men of experience and information as to transactions in the area and in the vicinity, and on these things they arrived at their opinions as to the value of this property.

By assignment of error the defendant urges that the court erred in permitting plaintiffs' witness, H. James Grove, to give his opinion of the value of the property in question for the reason that the opinion was based on the assumption and speculation that the property would be rezoned for industrial uses.

By isolation of a certain area of examination it could be asserted that the opinion was thus narrowly based but when his testimony is fully presented it becomes readily apparent that the contention is without merit. Specifically he based his opinion on comparable sales, that at some time it could be rezoned, its reasonable probable potential uses, and zoning at the time bearing in mind recognition of probable imminence of rezoning, plus knowledge of real estate. All of the elements mentioned here as the foundation on which the opinion of the witness was given were proper to be considered by him in the giving of his testimony. In addition to a consideration of the elements mentioned the witness

gave testimony as to need for putting the area in condition for residential and industrial use and considered all of these things in his opinion as to the value at the time of condemnation.

It is of course true that involved was an entry into the realm of speculation, but it is one which is not condemned.

In Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168, it was said: "Witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property, and all its surroundings may be shown and its availability for any particular use. If it has a particular adaptation for certain uses, this may be shown, and if such peculiar adaptation added to its value the owner is entitled to the benefit of it. But when all the facts and circumstances have been shown, the question at last is, what is it worth in the market?" See, also, Langdon v. Loup River Public Power Dist., 142 Neb. 859, 8 N. W. 2d 201; Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209; Leffelman v. City of Hartington, 173 Neb. 259, 113 N. W. 2d 107; State v. Mahloch, *ante* p. 190, 116 N. W. 2d 305.

The testimony of this witness, instead of being on a basis of assumption and speculation, was based upon all of the precepts declared in the foregoing quotation. It follows that the contention of the defendant as to this assignment of error is not meritorious.

The next assignment of error to be considered is that the court erred in admitting in evidence the sale price of two tracts of land. The purpose of this evidence was to show the market evaluation of other comparable land to aid the jury in arriving at the value of this land.

The two tracts were fully described as to condition, location, and use, and in the opinion of the witness they were subject to comparison for the purpose of arriving

at market value. The district court admitted this evidence and this court cannot well say that it erred in so doing.

In Langdon v. Loup River Public Power Dist., 142 Neb. 859, 8 N. W. 2d 201, it was said: "Evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of land condemned." In the opinion in this case the following observation was made which was approved in Lynn v. City of Omaha, 153 Neb. 193, 43 N. W. 2d 527: "It seems that there could be no better evidence of the true market or going value of land than the price paid for other, similar and similarly situated land sold at about the same time when, by evidence, it is shown that the price so paid for the other lands depends upon market or going value rather than other considerations."

Another contention which the defendant asserts as ground for reversal is that the court erred in refusing to strike the testimony of Alfred C. Kennedy, a witness who testified as an expert, that in his opinion the real estate involved was of the value of $77,000. The witness related his qualifications which were substantially the same as those of the witness Grove. There were departures but there can be no doubt that proper and sufficient qualifications were recited.

The error alleged is that the testimony as to value was improper for the reason that it was based upon evidence which had been held inadmissible by the trial court. The point of the contention is that the plaintiffs had attempted to adduce evidence or prices paid for other real estate in this general area and were not allowed to do so. Evidence of these sales never got into the record. This witness gave his opinion as to value and in arriving at that opinion, along with all other evidence bearing on the question of value, con-

sidered his own personal knowledge of sales made and the prices paid in the adjacent areas.

There is no evidence the effect of which is to say or imply that his opinion as to value depended or even was influenced by his knowledge of these sales. His own testimony is to the contrary. No case or text is cited which under such circumstances as are disclosed by the record sustains the contention of the defendant.

By another assignment of error the defendant urges that it was unduly restricted in the cross-examination of the plaintiff James F. O'Neill and the witness Kennedy, with reference to the purchase of the land here involved. There is no basis in the record for this assignment of error. These two witnesses were permitted to testify as to the date of purchase by the plaintiffs. They were prevented by objections of the defendant which were sustained by the court from going into any detail as to the price paid. It does not appear necessary to cite authorities to sustain a conclusion that the restriction on cross-examination which was imposed was proper.

The defendant asserts that the verdict of the jury is clearly excessive and against the weight and reasonableness of the evidence. In the determination of this question certain legal pronouncements have been made which must be regarded as controlling.

In Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168, it was said: "When the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong." See, also, Biggs v. Gottsch, 173 Neb. 15, 112 N. W. 2d 396.

In Smith v. Platte Valley Public Power & Irr. Dist., 151 Neb. 49, 36 N. W. 2d 478, it was said: "In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced there-

from." See, also, Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551.

On the question of the value of the property plaintiffs, as has been pointed out, presented two witnesses. Also as pointed out, each of these testified to a value of $77,000. Three expert witnesses testified as to value on behalf of the defendant. One of these testified that in his opinion it had a value of $45,000. Each of the other two fixed the value at $42,000. Incidentally the valuation from which the appeal was taken to the district court was $45,500. The jury by its verdict, as stated, fixed the value at $59,780.

It is pointed out here that there is much discussion in the evidence and the briefs relating to the character, quality, and suitability of this land for use and change of use, the possibility and probability of application for and granting of rezoning, and the probable cost of providing necessary facilities, the changing of the contour of the land, and the protection of boundaries. The defendant's witnesses took these matters into consideration in arriving at their estimate of value. The plaintiffs' witnesses also took them into consideration. Their positions were directly opposite.

Impropriety of the consideration of the testimony of the witnesses of the plaintiffs in these areas and in the other areas bearing on the question of values is discussed, but there is no assignment of error which either actually or by reasonable inference challenges the right to allow these matters to be employed by the jury in its determination of value. The evidence was before the jury and on it and the counterevidence of the defendant, a verdict was returned.

There is nothing in the evidence of the parties which under the principles of law which have been set out herein would permit this court to say that the verdict of the jury was clearly against the weight and reasonableness of the evidence.

The last assignment of error is that the court erred

in overruling the motion for new trial. No particulars are set forth in the assignment or in the discussion in the brief. For this reason and pursuant to Rule 8a 2(4) of the Revised Rules of the Supreme Court, it will not receive further consideration herein.

For the reasons set forth herein the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES EARL GOFF, APPELLANT.
118 N. W. 2d 625

Filed December 14, 1962. No. 35316.

1. **Constitutional Law: Searches and Seizures.** All evidence obtained by searches and seizures in violation of the Fourth Amendment to the federal Constitution is, by virtue of the due process clause of the Fourteenth Amendment guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible in a state court.
2. ———: ———. The Fourth Amendment's right of privacy is enforceable against the states through the due process clause of the Fourteenth Amendment.
3. ———: ———. All evidence obtained by searches and seizures in violation of the federal Constitution is inadmissible in a criminal trial in the courts of this state.
4. **Criminal Law: Searches and Seizures.** Haswell v. State, 167 Neb. 169, 92 N. W. 2d 161, is modified to the extent set out in the opinion.
5. **Criminal Law.** "Fresh pursuit" is pursuit instituted immediately and with intent to reclaim or recapture, where an animal has escaped, or a thief is fleeing with stolen goods, etc.
6. **Trial: Appeal and Error.** The judge presiding at a trial must conduct it in a fair and impartial manner. He should refrain from making any unnecessary comments or remarks during the course of a trial which are calculated to influence the minds of the jury. A remark or comment which is shown to be prejudicial to the rights of the party complaining, or which is such that it may be assumed prejudice will result therefrom, is fatal to the validity of the trial.
7. **Trial: Witnesses.** The practice of causing unexamined wit-

nesses, except those called as experts, to be sequestered, so that they may not hear the testimony of the witness being examined, is a good one, as it tends to elicit the truth and promote the ends of justice.

8. **Constitutional Law: Criminal Law.** A defendant in a criminal prosecution has a constitutional right to a public trial by an impartial jury, and when it appears to this court that a defendant has not been accorded a fair trial its duty is to grant a new trial.

Appeal from the district court for Dakota County: JOHN E. NEWTON, Judge. Reversed and remanded.

Mark J. Ryan, for appellant.

Clarence A. H. Meyer, Attorney General, and Cecil S. Brubaker, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SIMMONS, C. J.

In this case, defendant was charged with having in his possession and control narcotic drugs, contrary to law. He was also charged with being an habitual criminal. He was tried and found guilty of the narcotic drugs charge. In a separate proceeding, he was found to be an habitual criminal. He was sentenced to 10 years imprisonment. He appeals.

We will set out the errors assigned and discussed in the order in which we reach them. We reverse the judgment of the trial court and remand the cause for further proceedings.

The defendant offered no evidence. Accordingly, the summary of the evidence here is taken from the evidence offered by the State.

We will refer herein to certain officers of the Sioux City, Iowa, police as Iowa police. We will refer to officers of the South Sioux City, Nebraska, police as the Nebraska police.

The defendant here was acquainted with a Nebraska man and wife named Romesburg. They will be referred

to herein as the Romesburgs. Defendant also was acquainted with the daughter and son-in-law of the Romesburgs named Nordgren. We will refer to him by that name. The Nordgrens lived in South Sioux City, Nebraska.

September 30, 1961, the Romesburgs were visiting at the Nordgrens. Defendant was also visiting there that day. Nordgren testified that during that day, the defendant told him three times that he had in his possession a large quantity of narcotics. Nordgren testified that he did not believe what the defendant had told him. During the day, the defendant and the Romesburgs drove into Sioux City and returned. Mrs. Nordgren worked at a dancehall in Sioux City. She was taken there to her work in the early evening. About 9 p.m., the Romesburgs, Nordgren, and the defendant drove to Sioux City and to the dancehall. An Iowa policeman was working there. He was not on duty as a policeman.

It seems that there was some loud talk at a table occupied by the Romesburgs, the defendant, and Nordgren. Mrs. Nordgren cautioned them to be quiet. They went outside where Nordgren testified that defendant threatened to shoot him and tried to open the trunk of his car. No blows were struck, and no particular notice was paid to this quarrel by others.

About that time, Nordgren told the Iowa—not on duty—policeman that defendant had in his possession a large quantity of narcotics. The policeman radioed this information to an Iowa detective who, in plain clothes, came to the dancehall. The defendant was pointed out to the detective as the one having narcotics in his possession. The detective made no effort to arrest defendant at that time.

The defendant and the Romesburgs, in defendant's car, started to return to South Sioux City, and did return there at a slow rate of speed. The detective started to follow. Just before leaving the dancehall, Nordgren

told the detective to be careful for the defendant had a loaded revolver under the front seat of his car. The detective radioed his headquarters for help and started to follow the defendant's car. He lost the defendant's car in the traffic. He then started for South Sioux City and made contact with the defendant's car at Sixth Street and Dakota Avenue in South Sioux City. He made no effort to arrest defendant there. He radioed the Nebraska police to meet him at Ninth Street and Dakota Avenue. Upon reaching that point, the Iowa detective forced defendant's car to the curb, got out of his own car, came to defendant's car, and told defendant to get out of his car, that he was an officer, and that defendant was under arrest. He searched the defendant and found nothing. He then started to search the car. About that time an Iowa policeman, in uniform, came. The Romesburgs were ordered out of the car and a thorough search was made of the car. Nothing was found. The uniformed man put the keys to the car back in the ignition, he having removed them during the search.

The Iowa detective then took the keys and started to open the trunk. About that time, two Nebraska policemen arrived. The two Iowa police started to search the trunk. Defendant protested and tried to prevent the search. He was pulled away from the car by the uniformed policemen. Also, about that time, defendant started to run. The Iowa policeman pursued with a Nebraska policeman following. They ran defendant down, caught him, forcibly returned him, and "draped" him over the hood of his car.

In the meantime, the Iowa detective found and removed from the car a "ditty" bag which he opened, and found therein a loaded revolver and a number of bottles and packages. He took possession of them. He had defendant and his car driven to the South Sioux City, Nebraska, police station where he ordered the defendant locked up. He, with Nebraska police, then placed

identifying marks on each of the articles in the bag and on the bag itself, and delivered them to Nebraska police.

The Iowa detective then returned to Iowa. He came back a few days later when he accompanied Nebraska officers to Omaha where the bag and its contents, minus the loaded revolver, were delivered to a United States laboratory for testing as to narcotic content. There they remained until the trial of this case on February 8, 1962.

In the meantime, on January 19, 1962, defendant filed a motion to suppress the alleged narcotic articles on the ground that the search was made without a search warrant and that the articles were illegally seized. He moved that they be suppressed and excluded from evidence.

A hearing was had. A transcript of the testimony is in the bill of exceptions. The trial court found that a "quantity of narcotic drugs was found in the trunk of defendant's car," and that the search was not illegal; and denied the motion to suppress.

We have then a situation where an Iowa policeman arrests a man in Nebraska without warrant, searches his automobile without warrant, finds certain evidence which it is claimed is in violation of Nebraska laws, turns his prisoner over to Nebraska police for prosecution in Nebraska, and returns to Iowa.

This brings us to where we can state and determine defendant's assignments of error.

Defendant contends that the search and seizure were in violation of the Fourth Amendment to the Constitution of the United States and Article I, section 7, of the Constitution of this state. The two constitutional provisions are substantially identical. We copy only the Constitution of the United States which is as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath

or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Fourth Amendment, Constitution of the United States.

In Haswell v. State, 167 Neb. 169, 92 N. W. 2d 161, we held: "Information pertinent to an issue in a criminal case is admissible in evidence on the trial thereof notwithstanding it was obtained in an irregular or illegal manner. * * * A violation of the constitutional guarantee concerning search and seizure does not render information acquired thereby inadmissible on the trial of a criminal case against the person from or concerning whom the information was procured." That decision was filed October 3, 1958.

On June 19, 1961, the Supreme Court of the United States decided Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081. It held all evidence obtained by searches and seizures in violation of the Fourth Amendment to the federal Constitution is, by virtue of the due process clause of the Fourteenth Amendment guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible in a state court. The Fourth Amendment's right of privacy is enforceable against the states through the due process clause of the Fourteenth Amendment.

We have just held in State v. Easter, *ante* p. 412, 118 N. W. 2d 515, that: "All evidence obtained by searches and seizures in violation of the federal Constitution is inadmissible in a criminal trial in the courts of this state." Here it is contended that the evidence is inadmissible both by virtue of the Nebraska and United States Constitutions. Our holding in Haswell v. State, *supra,* is modified to the extent necessary to make it in accord with the decision of the Supreme Court of the United States in Mapp v. Ohio, *supra.*

The defendant, using the denial of his motion to suppress, as the vehicle, presents the issue here.

The trial court based its denial of the motion to suppress upon a finding that narcotics were found in de-

fendant's possession. We have searched the evidence of that hearing and there is not one word in it identifying or referring to anything found in defendant's car as narcotics.

The State relies on section 29-416, R. R. S. 1943, as authority for the arrest and argues that the arrest, without a warrant, being authorized by law, the search was incidental thereto and not unreasonable. Section 29-416, R. R. S. 1943, is as follows: "Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state *in fresh pursuit, and continues within this state in such fresh pursuit,* of a person, in order to arrest him on the ground that he is believed to have committed a felony *in such other state,* shall have the same authority to arrest and hold such person in custody as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state." (Emphasis supplied.)

It is patent that the right of an out-of-state officer to arrest is dependent on the "in fresh pursuit" limitation and also the "he is believed to have committed a felony in such other state" provision (here Iowa). It becomes important in view of the provisions of section 29-417, R. R. S. 1943 (not mentioned by the State), and section 29-420, R. R. S. 1943, defining fresh pursuit. Section 29-420, R. R. S. 1943, is as follows: "The term 'fresh pursuit,' as used in sections 29-416 to 29-420, shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit, as used herein, shall

not necessarily imply instant pursuit, but pursuit without unreasonable delay."

The reference to felony in section 29-420, R. R. S. 1943, obviously relates back to the "felony in such other state" provision of section 29-416, R. R. S. 1943.

Neither party has undertaken to define "fresh pursuit" to us or cite its meaning. Our search reveals the definition from Black's Law Dictionary found in 37 C. J. S., Fresh, footnote 65 (7), p. 1379, which is as follows: " 'Fresh pursuit,' as pursuit instituted immediately and with intent to reclaim or recapture, where an animal has escaped, or a thief is *fleeing* with stolen goods, etc." (Emphasis supplied.)

The definition rests on White v. State, 70 Miss. 253, 11 So. 632, wherein it was held: "What is fresh pursuit must be determined by circumstances, and where, as in this case, a felony is committed at night, discovered in the morning and the officer immediately follows and overtakes the felon, *who is attempting to escape*, it is not necessary that he shall have a warrant for his arrest; * * *." (Emphasis supplied.)

We find no evidence here that the defendant was "attempting to escape" or had any information that he was being pursued, and no evidence that he was fleeing to avoid arrest. On the contrary, the State's witnesses testified that defendant was driving along an interstate highway at a slow rate of speed and intending to take the Romesburgs to their home and then return into Iowa. The Iowa detective testified that the defendant was not fleeing from arrest or threatened arrest when he was arrested and his car searched.

The State also overlooks the provisions of section 29-417, R. R. S. 1943, which outlines the procedure after arrest under the provisions of section 29-416, R. R. S. 1943. None of the procedures there outlined were followed in this case.

We find no evidence here that justifies a finding of "fresh pursuit" in this case.

The State also relies on section 28-472.01, R. R. S. 1943, which provides that "any peace officer" having probable cause to believe that any automobile is being used for the transportation of narcotic drugs shall make search thereof with or without warrant. The fault of the argument is patent. The Iowa policeman making the search was not an officer of Nebraska.

The defendant contends that the trial court erred in not sustaining his motion to suppress. We need not enter into a discussion of the ramifications of a motion to suppress.

When the State offered the Iowa detective as a witness at the trial and produced the ditty bag as an exhibit, the defendant asked leave to cross-examine to lay a foundation, to show that the witness "had no search warrant and other things connected with it." The court ruled that the "admissibility of evidence was determined at a prior hearing" and denied the defendant's request. The witness then proceeded to produce and identified the contents of the bag. Again on cross-examination, the defendant asked the detective if he had a search warrant. The court sustained a State objection and also overruled an offer to prove that the witness had no search warrant, had made no attempt to get one, and had only hearsay information to sustain his search without a warrant.

The defendant then pointed out that the exhibits were not produced at the hearing on the motion to suppress and that he had no opportunity to examine the witness as to them at that hearing. The court then held that defendant had no right to lay a further foundation to the offer of the exhibits in evidence.

On further cross-examination, this witness testified that the exhibits had been in Omaha from early October in the possession of United States chemical analysts and had only been brought back on the morning of the trial. The State offered the bag and its contents in evidence, each bearing separate numbers. The defendant

objected and the court reserved its ruling until "the contents have been identified."

The analyzing chemist then identified nine of the exhibits as containing narcotic drugs. These were admitted in evidence, along with the gun but not loaded shells, over the objection of defendant that the evidence was unlawfully taken. The remaining exhibits were not admitted in evidence.

We hold that the search and seizure here was an unreasonable exercise of power and hence unlawful under the Constitutions of this state and the United States. The constitutional provisions were intended to prevent the procedure presented here. The evidence so secured was inadmissible. The trial court permitted prejudicial error in denying the defendant the right of the cross-examination and in admitting the evidence.

Two other things require attention. At the beginning of the trial, after the jury had been impaneled and sworn, the defendant moved to exclude the State's witnesses from the courtroom until after they had testified. The trial court, apparently, in the presence of the jury said, "I think perhaps it is nonsense. I have no patience with that type of motion whatsoever. However, in this case under the existing circumstances since the defendant feels he is being persecuted so unfairly I am going to give him the benefit of the motion and sustain the motion."

Save by direct language, we can think of no more effective way that the trial court could have told the jury that the State's witnesses were to be believed and would not alter their evidence so as to harmonize with those who testified first. The remark was prejudicial error even though the motion was sustained.

As late as Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758, we held: "The judge presiding at a trial must conduct it in a fair and impartial manner. He should refrain from making any unnecessary comments or remarks during the course of a trial which are calculated

to influence the minds of the jury. A remark or comment which is shown to be prejudicial to the rights of the party complaining, or which is such that it may be assumed prejudice will result therefrom, is fatal to the validity of the trial."

There are times when it is well to revert to the reasoned wisdom of some of our earlier decisions. As early as Binfield v. State, 15 Neb. 484, 19 N. W. 607, we quoted with approval from Greenleaf on Evidence, section 432, that an order excluding witnesses so that they may be examined out of the hearing of each other is rarely withheld.

In Chicago, B. & Q. R. R. Co. v. Kellogg, 54 Neb. 138, 74 N. W. 403, we held: "The practice of causing unexamined witnesses, except those called as experts, to be sequestered, so that they may not hear the testimony of the witness being examined, is a good one, as it tends to elicit the truth and promote the ends of justice."

The above holding was approved in Maynard v. State, 81 Neb. 301, 116 N. W. 53, Roberts v. State, 100 Neb. 199, 158 N. W. 930, Ann. Cas. 1917E 1040, and Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201. The error here is not in the exclusion of the witnesses but in the remark of the court in sustaining the defendant's motion. It was not only error but prejudicial.

The defendant requested an instruction to the effect that in weighing testimony of detectives, police officers, and other witnesses "employed for the purpose of procuring testimony against the accused," greater care should be exercised than in the case of witnesses who are wholly disinterested. He assigns error for the refusal to give the instruction. We find no evidence that any witness here was employed for the purpose of procuring testimony against the accused. The proposed instruction confuses two rules.

We held in Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151: "The mere fact that a witness in a criminal prosecution is a regular public law enforcement officer

does not entitle an accused to an instruction that the jury, in weighing his testimony, should exercise greater care than in weighing the testimony of other witnesses. * * * Where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested." See, also, Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632.

We find no error in the refusal to give the requested instruction.

In Wamsley v. State, 171 Neb. 197, 106 N. W. 2d 22, we held: "A defendant in a criminal prosecution has a constitutional right to a public trial by an impartial jury, and when it appears to this court that a defendant has not been accorded a fair trial its duty is to grant a new trial." In the course of the opinion, we quoted with approval from State v. Long, 127 Mont. 523, 268 P. 2d 390, as follows: "Whatever the status of a defendant in a criminal case may be and whatever be the nature of the crime with which he is charged, each and all are entitled to the same fair trial guaranteed by our Constitution. The Constitution makes no distinction between defendants but treats all alike, as must this court, whose duty it is to see that defendants in criminal cases brought before us are accorded a fair trial."

The record here requires that we reverse the judgment and remand the cause for further proceedings in accord with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT, V. EVA I. DILLON, A WIDOW, APPELLEE.
119 N. W. 2d 87

Filed December 21, 1962. No. 35263.

1. **Trial: Appeal and Error.** When evidence is conflicting, the verdict of a jury, or the finding of fact by a court in a law action for damages where a jury is waived, will be set aside where manifestly excessive and clearly wrong.
2. **Eminent Domain: Damages.** The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking.

Appeal from the district court for Sarpy County: JOHN M. DIERKS, Judge. Reversed and remanded.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, and Asa A. Christensen, for appellant.

Orville Entenman, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SIMMONS, C. J.

This is a case in eminent domain wherein the State appropriated land for the building of an interstate highway.

Pursuant to section 76-717, R. S. Supp., 1961, the owner of the land will be hereinafter referred to as the plaintiff.

Defendant appeals claiming that the verdict of the jury was manifestly excessive and clearly wrong and that the trial court erred in permitting a witness for the plaintiff to add as a separate item of damages the value of recreational advantages, particularly hunting.

The jury awarded the plaintiff $33,025 for land taken and land damaged. Both items of damage are included in the one sum. No way appears by which it can be determined the amount allowed by the jury for each item that is included in the total.

We reverse the judgment of the trial court and remand the cause for further proceedings.

Items herein referred to omit fractional parts of land or value beyond the usual decimal point.

The exact amount of the ownership of plaintiff in acres cannot be accurately determined. It was, however, in the neighborhood of 540 acres. The land bordered on the Platte River on the south and west near Gretna, Nebraska. There is some question in the evidence about plaintiff's title to some of the land; however, it is not in land taken.

The defendant appropriated a strip of land 300 feet wide, running north and south through plaintiff's land, or a total of 43 acres. Thirty acres of this were of good quality bottom farm land and 13 acres were described as "timber land."

Before the taking by defendant, there were about 53 acres of timber land in one tract with access on the land side on a privilege basis of a neighbor and not as a matter of right. After the taking, a small area was still accessible on a permission basis through the neighbor's land. The remainder not taken had no access available from the land side. Reference is made to the cutting of posts on this land; yet, no one testified to the quantity, quality, or value of posts so taken. Reference is also made to its use for pasture and shelter of cattle in the wintertime. Yet, here again, no one undertook to fix the quantity, quality, or value of the pasture either in the land taken or that not taken.

There was some testimony as to the hunting rights and their value. Obviously, some of the hunting rights on this land at the bend of the river were taken, but we find no evidence that fixed that value. Yet, some of plaintiff's witnesses testified to a value of as much as $200 an acre for the timber land taken and depreciated the land not taken as much as 75%.

There remained about 25 acres of good farm land west of the highway. This was accessible by going

north from the remainder of the farm, a distance of a mile or more, then across the highway and south to the land. Its inaccessibility was only in the matter of distance.

There remained east of the highway over 100 acres of good bottom land suitable for corn farming.

The farm buildings were east of the highway.

This opinion then will deal with the value of the land taken, the farm land remaining, and the timber land remaining.

Plaintiff used the testimony of five witnesses as to value of the land taken and the damage to that remaining. Defendant used two. Two of plaintiff's witnesses fixed the total of the two items at less than the jury's verdict. One of plaintiff's witnesses was plaintiff's son and tenant. He fixed the two values at considerably more than the jury's verdict. His qualifications as an expert on value are quite questionable. Yet, his testimony is not questioned in this regard. Another of plaintiff's witnesses arrived at a value of land taken and land damaged and added to his total the loss of hunting rights as a value separate and apart from the land. It is his testimony in that regard that is questioned here. We do not deem it necessary to determine that assignment.

There were several acres of plaintiff's hill pasture land damaged. Dirt for grading was taken from some of this land and without question it was depreciated in value. Yet, here again, the jury was left to speculate as to any sound basis for the determination of the value of the pasture land for pasture purposes before and after taking.

There were, according to some witnesses, about 160 acres of good bottom corn land. Thirty acres were taken. The balance was left in two tracts. There were about 25 acres west of the highway and the balance to the east. Witnesses fixed the value of this land before the taking as high as $400 an acre. They then depreciated

the value of the remaining land, sometimes on a percentage per acre basis. It is obvious that in the minds of the witnesses, the greatest damage occurred to this good farm land. It is undisputed that it produced as much corn per acre after the highway was built as it did before, but the value of that production is not shown. It does appear that before the taking that the larger area of this good land was farmed with corn, rows running east and west. After its separation into two tracts, the rows were run north and south, and an increased number of "point rows" was caused. Plaintiff's tenant operated "four row" power machinery. These point rows caused an inconvenience. There is no showing more than that as to the damage caused by the taking.

The good land west of the highway also was farmed north and south with the resulting inconvenience in corn rows as on the east tract. Stress is placed on the fact that although this land was separated physically by the highway for a distance of 300 feet, to go from one piece to the other involved traveling some 2 or 3 miles with farm machinery. The number of trips of this kind taken during the year does not appear. There is testimony that the corn was worked three times during the summer and that corn picking was a once-over job, presumably done with power machinery.

There is no testimony that the land was prepared for planting. Assuming that that was done, the total movement of farm machinery from the east to the west land was five times, but even that does not appear, for the tenant's home place was on other land about equal distance from the two tracts. No witness testified to the added cost or value of this operation as a basis for depreciation of the value of the land.

The tenant testified that there were no storage facilities for corn raised west of the highway and that instead of hauling it for storage in facilities east of the highway, he sold that corn on the open market. Here again, there is no testimony that there was either a loss

from the sale or a necessity for the sale, that would be reflected in the value of the land. Yet, as to this good corn land, witness after witness testified without foundation of facts upon which to base it, that "I depreciated" the entire acreage in varying amounts because of the taking of the 30-acre strip of farm land.

There is another tract of about 100 acres recently cleared of timber and devoted to small grain because of stumps and roots that make the use of farm machinery for corn raising difficult, if not impossible. The productivity of this land is not shown. It is not touched by the highway nor its availability for farm and productivity in any way decreased because of the defendant's taking. Yet again, witnesses testified to that "I depreciated" the value of that land also.

There is no question here but that plaintiff suffered substantial damage for lands taken and some damage to lands not taken. There is also no question that witnesses testified to a total damage greater than that which the jury allowed. Other witnesses testified to appreciably less than that the jury allowed. But when the evidence is all reviewed, the result is a verdict for an amount that is clearly excessive and clearly wrong.

Courts have no right to order one man to pay money to another without some basis in fact and in law. The same rule applies to money being taken from the State.

We see no essential difference in this case and that of Moyer v. Nebraska E. G. & T. Coop., 171 Neb. 879, 108 N. W. 2d 89. We held: "When evidence is conflicting, the verdict of a jury, or the finding of fact by a court in a law action for damages where a jury is waived, will be set aside where manifestly excessive and clearly wrong."

"The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking." Armbruster v. Stanton-

Pilger Drainage Dist., 169 Neb. 594, 100 N. W. 2d 781. The trial court instructed the jury in accord with the above rule.

The difficulty is that much of the evidence here, received without objection, did not permit the determination of damages under the above rule.

We reverse the judgment of the trial court and remand the cause of action for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CAROL C. FAIRLEY ET AL., APPELLEES, V. ARTHUR J. KEMPER ET AL., APPELLEES, IMPLEADED WITH JEAN F. CLOUATRE, APPELLANT.
118 N. W. 2d 754

Filed December 21, 1962. No. 35288.

1. **Process.** It is not necessary that a summons be served on a cross-petition filed after answer day on defendants who thereafter file answers to the original petition and who are represented by attorneys at the trial of the case.
2. **Taxation: Limitations of Actions.** A private tax sale certificate on which action has been properly commenced within the period prescribed by section 77-1856, R. R. S. 1943, will not become void by reason of the period of time which thereafter transpires during the pendency of the action.
3. **Partition.** A court acquiring jurisdiction of property for partition acquires complete jurisdiction of the property and affords complete justice to all parties in that action with respect to the subject-matter.

Appeal from the district court for Lancaster County: PAUL W. WHITE, Judge. Reversed and remanded.

Barney, Carter & Buchholz, for appellant.

Mason, Knudsen, Dickeson & Berkheimer, for appellees Fairley.

Kier, Cobb & Luedtke and Janice L. Gradwohl, for appellee Kemper.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This is a partition action brought by the plaintiffs Carol C. Fairley and Mary E. Fairley in the district court for Lancaster County, Nebraska, to partition a single lot in Lincoln, Nebraska. All of the defendants were either served with process or appeared in the action.

Plaintiff Carol C. Fairley and defendant Arthur J. Kemper each owned an undivided one-half of the premises.

The defendants Germain W. Vaughn and Mrs. E. Ferne Vaughn were tenants in possession of the premises. The Lincoln Telephone and Telegraph Company, a corporation, had an easement thereon. Edna P. Sorenson had a mortgage on the plaintiff Carol C. Fairley's interest therein which was assigned to him during the litigation and merged in his title. The defendants City of Lincoln, Nebraska, and County of Lancaster, Nebraska, had liens for taxes thereon which taxes were subsequent in time, and therefore prior in right, to the taxes in the tax sale certificate involved in this controversy. The plaintiff Mary E. Fairley was the spouse of Carol C. Fairley and had no interest therein except as such spouse. Carol C. Fairley will be hereinafter referred to as plaintiff. None of the rights of any of the defendants in this paragraph mentioned are in dispute and will not be discussed further.

The real controversy is with respect to the rights of the defendant named in the plaintiff's petition as Felix G. Clouatre, but whose true name was Jean F. Clouatre. He will be designated by his proper name or in some instances as Clouatre.

Clouatre's claim arose by reason of the lien of a tax sale certificate No. 25258, dated August 28, 1956, upon the premises involved in the partition suit. It was

issued to him by the treasurer of Lancaster County, Nebraska, for the taxes of the county of Lancaster and city of Lincoln for the year 1954. The subsequent county and city taxes were thereafter paid by him up to and including the year 1957, and the city taxes for the year 1958.

The district court in the judgment in partition, rendered after a trial of the issues, found that Clouatre had no lien on the premises by reason of his tax sale certificate because he had failed to comply with section 77-1856, R. R. S. 1943, and more than 5 years had passed since the date of the certificate.

Clouatre filed a motion for new trial and has appealed to this court from the order of the district court overruling the same.

Clouatre assigns several errors in the trial court's rulings, among which are that it erred in the following respects: In holding Clouatre had no lien on the premises under his tax sale certificate, dated August 28, 1956; in holding he had failed to comply with section 77-1856, R. R. S. 1943, when he was made an original party defendant in the action by the petition of the plaintiff which set forth the nature and extent of his lien, and when thereafter with leave of court he filed an answer and cross-petition; in holding Clouatre's tax sale certificate was barred by statute of limitations under the state of the record disclosed in the action and hereinafter discussed; in failing to hold the plaintiff's petition was a sufficient foundation for the relief sought by Clouatre's cross-petition; and in failing to hold that the failure of any party at the trial to object to the admission of the documentary evidence offered in support of Clouatre's claim amounted to a waiver of any defect arising from the fact that no service of process was had on the cross-petition.

We sustain these assignments.

It is not clear whether the basis of the trial court's ruling that the defendant Clouatre had not complied

with section 77-1856, R. R. S. 1943, rests upon the theory that Clouatre had not commenced his action within 5 years from the date of his tax sale certificate; or whether the court held that the action had to proceed to judgment within the 5-year period; or whether his lien could not be adjudicated in a partition action.

Plaintiff's petition in partition was filed February 10, 1961. It made Clouatre a party defendant and set out that he had a tax sale certificate on the premises, describing it by number, and stating the amount of the taxes originally and subsequently paid thereunder. It asked for a determination of the rights of the parties, a partition of the premises, and, if it could not be equitably divided, a sale thereof. All of the defendants except Clouatre were served with summons requiring them to answer on March 27, 1961. Clouatre filed a voluntary appearance April 10, 1961, reserving the statutory time to plead. On August 15, 1961, after obtaining leave of court, Clouatre filed his answer and cross-petition out of time, setting up the cause of action on his tax sale certificate; and praying for an accounting of the amount due to be made a first lien thereon, and that the premises be sold and on the sale thereof the amount of the lien be paid to him on his cross-petition. The defendant Kemper, on August 16, 1961, filed an answer to plaintiff's petition containing a denial on information and belief of the paragraph in that petition describing the claim of Clouatre on his tax sale certificate. It also prayed that an accounting be had; that the rights of the parties be determined; that the validity of any tax sales or tax liens be determined; and that any taxes be declared a paramount lien against the interest of the plaintiff against whom a cross-petition was filed asking for an accounting for rents received by him.

All this occurred before the expiration of 5 years from the date of Clouatre's tax sale certificate which period expired August 28, 1961.

On January 17, 1962, a trial of the issues took place

at which all of the parties except the tenants and defendant Sorenson were represented by counsel. The tax sale certificate and tax receipts of defendant Clouatre were offered in evidence and received without objection by anyone.

The issues with respect to Clouatre's cross-petition were between Clouatre and the plaintiff and defendant Arthur J. Kemper, the owners of the premises partitioned. The rights of the other defendants are not affected thereby.

The plaintiff at his option made Clouatre a party as permitted by our statute on partition, section 25-2172, R. R. S. 1943. His petition set out the claim of Clouatre and asked the rights of the parties be determined. Clouatre's answer and cross-petition filed out of time set out his lien arising by virtue of the tax sale and prayed for the determination thereof. Thereafter the defendant Kemper, on August 16, 1961, filed his answer to plaintiff's petition denying the allegations thereof with respect to Clouatre's tax sale and asking that the validity of the tax sale certificate and tax receipts be determined. All this occurred before the expiration of the 5-year period from the date of the tax sale certificate. It is not necessary that a summons be served on a cross-petition filed after answer day on defendants who thereafter file answers to the original petition and who are represented by attorneys at the trial of the case. Smith v. Allen, 63 Neb. 74, 88 N. W. 155. The action on Clouatre's claim was commenced and pending and the issues joined on August 16, 1961, when Kemper filed his answer and cross-petition and no further process was necessary.

From the briefs of the parties in this court it appears that the judgment of the trial court as to the claim of Clouatre might have been based on the theory that his claim would be barred unless judgment was entered thereon within 5 years from the date of the tax sale certificate. This theory is based on a misconception of

the holding of this court in Gibson v. Peterson, 118 Neb. 218, 224 N. W. 272. This court in that case in discussing the question before it merely held that an action to foreclose a tax sale certificate must be brought within the period of 5 years from the date thereof. In the opinion it did cite Alexander v. Shaffer, 38 Neb. 812, 57 N. W. 451, and quoted therefrom. The quotation from the last-cited case states that the limitation in the revenue law is a limitation on the lien itself. In the last-cited case a defendant sought to enforce payment on a tax sale certificate over 19 years old in a tax foreclosure proceeding brought by a holder of a tax sale certificate subsequent in time. The court there held that the lien of the defendant was wholly extinguished. The court was construing section 180 of the revenue law then in existence. The court in Gibson v. Peterson, *supra,* was considering section 6097 of the Compiled Statutes of 1922. Both of these statutes had substantially the same provisions as our present statute now before us, section 77-1856, R. R. S. 1943, which reads in part as follows: "If the owner of any tax sale certificate shall fail or neglect to demand a deed thereon, or to commence an action for the foreclosure of the same within five years from the date of the sale, such tax sale certificate shall cease to be valid or of any force or effect whatever, and the real estate covered thereby shall be forever released and discharged from the lien of all taxes for which the same was sold." It was the failure to bring suit within the 5 years that extinguished the defendant's lien in Alexander v. Shaffer, *supra.* There was no suggestion that the lien would become void pending suit duly commenced within the period provided by law and the plain import of the statute then construed and the statute now before us negatives that construction. Neither did the court in Gibson v. Peterson, *supra,* so hold.

Jones v. Gibson, 119 Neb. 574, 230 N. W. 249, which was decided a year later than Gibson v. Peterson, *supra,* was an action to enjoin a sheriff's sale in a tax foreclosure

suit. The defendant in the injunction action who was the plaintiff in the tax foreclosure proceeding had brought the tax foreclosure action within less than a month of the expiration of the 5-year period after the date of the tax sale certificate. The court in Jones v. Gibson, *supra,* stated: "As noted herein, defendant's tax sale certificate is dated November 6, 1922, and he began foreclosure proceedings October 10, 1927, which was clearly within the time that would prevent the application of the statute of limitations from barring the beginning of an action to foreclose the tax lien against the land in suit. The five-year period allowed by the statute would not have expired for almost thirty days after the action was begun." The decree in the tax foreclosure proceeding then under consideration must have been rendered considerably after the 5-year period. A private tax sale certificate on which action has been properly commenced within the period prescribed by section 77-1856, R. R. S. 1943, will not become void by reason of the period of time which thereafter transpired during the pendency of the action.

The last question before us is whether or not an affirmative judgment in favor of a cross-petitioner on a tax sale certificate can be had in a partition action. The defendant Clouatre maintains that it can and the defendant Kemper maintains that the filing of any action except a separate foreclosure suit cannot extend the period of validity of the tax sale certificate in any event. He cites Gibson v. Peterson, *supra,* which has been hitherto discussed and is no authority for such a rule of law, and other cases which have no application.

Section 25-2172, R. R. S. 1943, permits the plaintiff at his option to join as parties all creditors having a specific or general lien upon all or any portion of the property involved in the partition. Section 25-2176, R. R. S. 1943, provides that issues be joined and tried between any of the contesting parties. Section 25-2177, R. R. S. 1943, sets forth the method of proving the claims of both

plaintiffs and defendants. Section 25-2178, R. R. S. 1943, states when uncontroverted statements in the petition and answers will be taken as true. Section 25-2179, R. R. S. 1943, provides that after all the shares or interests of the parties shall be settled, judgment shall be rendered confirming the shares and interests and directing partition to be made accordingly. It would appear not only useless but highly confusing to allow the plaintiff to make lienholders parties if their rights were not to be determined. If they are to be determined it would appear in many cases equally futile if they could not be enforced by affirmative action of the court. In Drake v. Morrow, 140 Neb. 258, 299 N. W. 545, this court stated: "A court acquiring jurisdiction of property for partition acquires complete jurisdiction of the property and affords complete justice to all parties in that action with respect to the subject-matter."

In the case before us it appears from what has been said that no service of summons on the defendants upon Clouatre's cross-petition was necessary in the state of the pleadings in the action. The issues were joined upon the question of the validity of the tax sale certificate set out within the period provided by law for bringing such an action. It was a matter expressly provided to be adjudicated in a partition action both by statute and the rules of equitable procedure. Also the time in which the litigation was pending did not affect the validity of the lien. It follows that the court should have determined the amount due on Clouatre's tax lien certificate, entered a judgment in his favor therefor, and directed the same to be paid by the sale thereof unless redemption be made as provided by law.

The judgment is reversed and the cause remanded with directions to compute the amount due on the lien of the cross-petitioner Clouatre, and enter judgment thereon in accordance with this opinion.

REVERSED AND REMANDED.

PAULINE EVERETT, APPELLANT, V. GEORGE H. HENING, APPELLEE.

118 N. W. 2d 639

Filed December 28, 1962. No. 35260.

1. **Trial: Appeal and Error.** In a case where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed.
2. **Trial.** The burden of proving a cause of action or defense is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture.
3. **Negligence: Trial.** The trial court may, in a negligence case, grant a motion for an instructed verdict or for a judgment notwithstanding the verdict if the evidence, considered most favorably to the party against whom the motion is directed, is insufficient to sustain a verdict for him.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Burbridge & Burbridge and Arthur C. Thomsen, for appellant.

Gaines, Spittler, Neely, Otis & Moore, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action at law instituted in the district court for Douglas County, Nebraska, wherein Pauline Everett, plaintiff and appellant, seeks to recover damages from George H. Hening, defendant and appellee, for injuries which she alleges were caused by the negligence of the defendant. The case was tried to a jury. A verdict was returned in favor of the defendant and judgment was rendered on the verdict. A motion for new trial was duly filed, which motion was overruled. From the judgment and the order overruling the motion for a new trial the plaintiff has appealed.

The cause of action grew out of a collision between an automobile operated by the plaintiff and one operated by the defendant on North Fifty-second Street in Omaha,

Nebraska, a short distance north of the intersection of this street with Pratt Street, at about 11:15 p.m., on February 26, 1960. Immediately before the collision and up to and including the time of collision the defendant was operating his automobile in a southerly direction on the west or his right-hand side of Fifty-second Street. Before the collision plaintiff operated her automobile in a northerly direction on the east or her right-hand side of Fifty-second Street. In the vicinity of the intersection of Fifty-second and Pratt Streets, because of the automobile of the plaintiff coming upon ice in the street, her automobile was caused to careen westward out of the proper lane of plaintiff into the proper lane of the defendant where its left front wheel ran into a snowbank or ridge at the west edge of the southbound lane of traffic, where it stopped. At that point the front end of this automobile and the front end of the automobile of the defendant came into collision. The foregoing is a reflection of evidence which is not in dispute.

The substantial theory of the plaintiff's claim of right to recover damages is that the defendant was negligent in the following particulars: That he failed to have his automobile under proper control; that he failed to apply his brakes and stop his automobile; that he failed to keep a proper lookout; that he failed to operate his automobile in a cautious and prudent manner under the existing circumstances and conditions; and that he failed to see plaintiff's automobile which, in the exercise of reasonable care he should have seen in time to avoid striking it.

To support her claim plaintiff gave testimony in substance that on the night in question Fifty-second Street was open for traffic in both directions and that she was going north at a speed of between 20 and 25 miles an hour. She stated: "As I was driving north on 52nd Street, I had gone into a skid which threw my car from side to side and it ended in a snowbank. As I was in the snowbank I could not move my car or get it out of there

and then—." This was on the west side of the street, and she said: "My car had swayed over to the west side of the street into the snowbank." She testified further that the skid was caused by striking ice which was on the right side of Fifty-second Street and "more to the north" of the intersection with Pratt Street. She testified further that there was an oncoming car which did not appear to slow down. At the time she hit the snowbank the car was still approaching and it appeared to be "about two and a half or three houses away," or about a half a block away. She gave testimony that she had crossed the street and struck the snowbank, and just about that time or a second or so later the defendant's car struck her.

There is no certainty as to the distance the automobile of plaintiff traveled after it started to skid, and no descriptive information as to the manner in which it careened and skidded. There is no information as to where it was when it left the east side of Fifty-second Street and passed over into the path of the defendant's automobile. There are estimates of total distance traveled after starting to skid of from 60 to 175 feet to the north. There is no evidence of measurements taken. The witness who testified to the 175-foot distance reduced his estimate to about 60 feet. The best information given was that plaintiff's automobile stopped in front of the second house north of Pratt Street.

The husband of the plaintiff was following her in another automobile. He testified that he observed the lights on the automobile of the defendant when it was a block away which estimate was later fixed at about 600 feet. He testified that he saw the plaintiff's automobile stop, whereupon he stopped his own automobile and proceeded to the scene. He testified that the collision took place in 10 to 15 seconds of the time plaintiff's automobile came to a stop. He based his estimate on the time it took him to open the door of his own automobile, get out, and straighten up.

There are other details in the evidence adduced by the plaintiff but the foregoing contains that which is basic in the consideration of whether or not the defendant was proved guilty of any of the incidents of negligence charged against him.

On the trial several witnesses were called to testify on behalf of the defendant as to incidents involved in the collision and immediately prior thereto, and, of course, if there was anything in that evidence which could be said to be in favor of the plaintiff she was entitled to have the benefit of it in a consideration of whether or not she had established prima facie proof of her cause of action. Without going into a review of this evidence it will be stated that in the evidence on behalf of the defendant there is nothing which tended to prove the negligence charged against the defendant.

The brief of plaintiff contains six assignments of error which she contends are grounds for reversal of the judgment, but before considering them, if they require consideration, the question of whether or not there was sufficient proof of negligence to require submission of that question to a jury must be determined. At the conclusion of the evidence of the plaintiff, at the conclusion of the evidence for the defendant, and again at the conclusion of all of the evidence a motion was made by the defendant for a directed verdict. These motions were each overruled.

This requires consideration first herein of the question of whether or not the evidence was sufficient to sustain a verdict in favor of the plaintiff. This question must be measured by the rule that where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed. See, Advance Thresher Co. v. Kendrick, 91 Neb. 645, 136 N. W. 843; Patrick v. Shallcross, 123 Neb. 742, 243 N. W. 907; Holberg v. McDonald, 137 Neb. 405, 289 N. W. 542; Eilts v. Bendt, 162 Neb. 538, 76 N. W. 2d 623.

As already pointed out the plaintiff has set forth five specifications of alleged negligence against the defendant. Before discussing them in relation to what appears in the record, attention is directed to the incidents of operation of plaintiff's automobile from the time of the commencement of skidding until the automobile came to rest in the snowbank. The skidding started in the east driving lane of Fifty-second Street and ended in the west driving lane. It of course crossed over but where, how, and what course it took in crossing cannot be ascertained from the record. This all rests in the realm of conjecture and speculation except that it stopped in the lane proper for movement of the automobile of the defendant and out of the lane recognized as the one for proper movement of the automobile of plaintiff.

With this and all the other evidence in mind, it is only on the basis of conjecture and speculation that the jury could come to a conclusion that the defendant failed to have his automobile under proper control; that he failed to apply his brakes or had time and opportunity to apply them; that he failed to keep a proper lookout; that he failed to operate his automobile in a cautious and prudent manner under the circumstances and conditions disclosed; or that he failed to exercise reasonable care to see the automobile of plaintiff and to stop and avoid striking it.

The applicable rule is the following: "The burden of proving a cause of action or defense is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture." Grosvenor v. Fidelity & Casualty Co., 102 Neb. 629, 168 N. W. 596. See, also, Hayes v. Chicago, B. & Q. Ry. Co., 131 Neb. 687, 269 N. W. 623.

This being true the district court should have sustained the motion of the defendant for a directed verdict. The rule is stated in Spracklin v. Omaha Transit Co., 162 Neb. 351, 76 N. W. 2d 234: "The trial court may, in

a negligence case, grant a motion for an instructed verdict or for a judgment notwithstanding the verdict if the evidence, considered most favorably to the party against whom the motion is directed, is insufficient to sustain a verdict for him."

The rule of law that where the conclusion reached by the jury was the only one permissible under the pleadings and evidence the judgment will be affirmed is applicable, and in the light of this a specific consideration of the assignments of error contained in the plaintiff's brief is not required.

For the reasons set out herein the judgment of the district court is affirmed.

AFFIRMED.

THOMAS M. SHERIDAN, DOING BUSINESS AS SHERIDAN CHEVROLET & IMPLEMENT CO., APPELLEE, V. DUDDEN IMPLEMENT, INC., A CORPORATION, APPELLANT.
119 N. W. 2d 64

Filed December 28, 1962. No. 35274.

1. **Subrogation.** The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability.
2. **Assignments: Subrogation.** Ordinarily an assignment is not essential to the enforcement of a right of subrogation.
3. **Contracts.** An agreement, in order to result in a novation, must contain two stipulations: One to completely extinguish an existing liability, and the other to substitute a new one in its place.
4. **Sales.** Under section 36-207, R. R. S. 1943, where the vendee is a nonresident of Nebraska, the filing of a conditional sale contract covering personal property in the office of the county clerk in the county where the property is located gives constructive notice of the conditional sale contract to a purchaser without actual notice.

Appeal from the district court for Perkins County: VICTOR WESTERMARK, Judge. Affirmed.

Hastings & Wanek and Firmin Q. Feltz, Jr., for appellant.

McGinley, Lane, Mueller & Shanahan, W. C. Conover, and Franklin D. Carroll, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

Plaintiff brought this action in replevin to recover possession of a grain harvesting machine referred to in the record as a combine. The defendant denied generally. The jury found for the plaintiff and defendant has appealed.

The evidence shows that Thomas M. Sheridan, plaintiff, was engaged for many years in the implement business at Sutton, Nebraska, under the name of Sheridan Chevrolet & Implement Co. On or about May 29, 1958, Sheridan sold the combine here involved to Willard J. Levander for the sum of $7,300, $5,000 of which was to be financed by Sheridan. The transaction was not to be closed and the necessary instruments executed until the combine was delivered. Employees of Sheridan delivered the combine from a point where it was procured in Missouri to Levander at Meadow Grove, Kansas, several weeks later. The employees not having completed the transaction upon the delivery of the combine, Sheridan sought out Levander in Kansas, procured the down payment, and accepted a conditional sale contract providing for payments of $5,375.83 before title was to pass. Sheridan assigned the conditional sale contract to General Motors Acceptance Corporation with recourse. Shortly prior to August 7, 1958, Sheridan learned that the conditional sale contract had not been filed for record. He sought out Levander and accepted a chattel mortgage from him on the combine bearing the date of

August 7, 1958, which he filed for record in the office of the county clerk of Scotts Bluff County, Nebraska. Sheridan testified that he took the chattel mortgage to protect himself if he was called upon to pay the balance due on the conditional sale contract under his assignment to General Motors Acceptance Corporation with recourse. Sheridan was later called upon and did pay the balance due on the conditional sale contract to the General Motors Acceptance Corporation. The latter failed to return the conditional sale contract to Sheridan, its district representative testifying that it had either become lost or mistakenly sent to Levander.

On October 31, 1958, Sheridan and one Selvy, the district representative of General Motors Acceptance Corporation, personally checked the chattel mortgage records in Scotts Bluff County, Nebraska, and found that the conditional sale contract was not filed for record. On the same day, through information furnished by Levander, they found the combine on a farm 5 miles west of Minatare in Scotts Bluff County, Nebraska. The combine was still on this farm at 5:30 p.m., on this day. On the same day the conditional sale contract was filed for public record in Scotts Bluff County.

On December 1, 1958, the defendant, Dudden Implement, Inc., traded a truck and trailer to Levander for two combines, one of which is the subject of this action. The trade was made at Brush, Colorado, where the combines were then located and where Levander was living. Defendant checked the records of Morgan County, Colorado, the county in which Brush is located, and found no liens of record. Defendant sold the combine but obtained it back when Sheridan's claimed interest was made known to it. It is the contention of defendant that it had no knowledge of any interest in the combine and that the filing of the conditional sale contract in Scotts Bluff County was invalid for the purpose of giving constructive notice under the recording statutes.

Levander was engaged in custom harvesting in Kansas and Nebraska. There is sufficient evidence to sustain a finding that Levander was a resident of Brush, Colorado, and therefore a nonresident of Nebraska. When Sheridan paid the balance due on the conditional sale contract to the General Motors Acceptance Corporation he became subrogated to the rights of that corporation to the extent of the payment made under the circumstances shown by the record. The general rule is: "The doctrine of subrogation, which at one time was limited in its operation to sureties, still finds its most frequent application where a guarantor or a surety makes good the default of his principal. On discharging the obligation of the principal, the surety is generally subrogated to the rights of the creditor or obligee and becomes entitled to the securities and the means or remedies which the creditor has for enforcing payment against the principal or others who are liable for the debt." 50 Am. Jur., Subrogation, § 49, p. 714. See, also, American Surety Co. of New York v. School Dist., 117 Neb. 6, 219 N. W. 583; Mead Co. v. Doerfler, 148 Neb. 75, 26 N. W. 2d 393. We need not give consideration to the contention that Sheridan had no assignment of the conditional sale contract from General Motors Acceptance Corporation before the replevin action was brought, for an assignment is unnecessary where the right of subrogation exists. Crawford State Bank v. McEwen, 132 Neb. 399, 272 N. W. 226.

Since Sheridan had acquired the rights and remedies of the General Motors Acceptance Corporation the only question to be determined is whether or not the defendant had constructive notice of the conditional sale contract, the defendant admittedly not having actual notice of it. This requires us to determine whether or not applicable recording statutes were complied with so as to preserve Sheridan's interest in the combine as against one claiming an interest but having no actual notice.

The applicable recording statute states in part: "Where a vendee or lessee of personal property, * * * obtains actual possession pursuant to a contract of sale or lease containing a stipulation which makes the transfer of title or ownership depend on any condition, such stipulation shall not be valid against any purchaser, * * * without notice * * * unless the said contract or lease * * * or a copy thereof be filed in the office of the clerk of the county within which such vendee or lessee resides, or if the vendee or lessee is a nonresident of the state in the office of the clerk of the county where the property is located." § 36-207, R. R. S. 1943.

The evidence sustains a finding that Levander was a nonresident of Nebraska. It sustains a further finding that the conditional sale contract was filed for record in the office of the clerk of Scotts Bluff County, Nebraska, on October 31, 1958, and that the combine was located in that county on such date. The recording of the conditional sale contract was in accordance with section 36-207, R. R. S. 1943, and constituted constructive notice to a subsequent purchaser after October 31, 1958. The jury's verdict, finding that the interest of Sheridan in the combine was superior to that of the defendant, is supported by the evidence.

It is the contention of defendant that the execution of the chattel mortgage by Levander and its acceptance by Sheridan constituted a novation resulting in the cancellation of the conditional sale contract and the taking of the chattel mortgage in its stead. The chattel mortgage transaction was solely between Levander and Sheridan at a time when Sheridan's only interest was a contingent liability on his guaranty. The General Motors Acceptance Corporation, to which the conditional sale contract had been assigned, was not a party to it nor did it agree to the cancellation of the conditional sale contract upon the taking of the chattel mortgage. In order that an agreement result in a novation there must be an extinguishment of the existing

liability and the substitution of a new one in its place. In re Estate of Wise, 144 Neb. 273, 13 N. W. 2d 146. The taking of the chattel mortgage did not result in a novation.

Defendant further contends that the taking of the chattel mortgage by Sheridan released the conditional sale contract, or at least estopped him from asserting the conditional sale contract because of the inconsistency of interest in the two instruments and the recognition of title in Levander in accepting the chattel mortgage. This contention would be a valid one if Sheridan accepted the chattel mortgage at a time when he was also the owner of the conditional sale contract, which he was not. General Motors Acceptance Corporation was the owner of the conditional sale contract. Sheridan had no interest in it other than a contingent liability upon the default of Levander. Upon the payment of the balance due under his contract of guaranty, Sheridan's right of subrogation first arose, unimpaired by the transactions which had preceded it.

Error is assigned in that the trial court admitted evidence, over objection, of transactions between defendant and Levander after the filing of the present case. The trial court by an instruction directed the jury to disregard the specific evidence to which objection was made. The instruction corrected the error.

We have examined the remaining assignments of error and find nothing in them that is prejudicial to the rights of the defendant. For the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.

MURIEL R. CHIPMAN, APPELLEE, V. DALLAS V. CHIPMAN, APPELLANT.
118 N. W. 2d 761

Filed December 28, 1962. No. 35291.

1. **Divorce.** A general rule in the determination of whether or not a ground for divorce has been established is that acts asserted as grounds for divorce must be corroborated.
2. ———. The statutory rule that no decree of divorce and of nullity of a marriage shall be made solely on the declarations, confessions, or admissions of parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose has application alike in default and contested cases.
3. ———. Any unjustifiable conduct by either the husband or the wife which destroys the legitimate ends and objects of matrimony constitutes extreme cruelty as defined in section 42-302, R. R. S. 1943.
4. ———. In an action for divorce, even where there is no appearance by the defendant, the trial judge must be satisfied that the case is prosecuted in good faith and without collusion, and that a cause of action exists. He is not bound to accept as conclusive, in all cases, the testimony of the plaintiff, although corroborated in some minor details.

Appeal from the district court for Seward County: JOHN D. ZEILINGER, Judge. Reversed and remanded.

Norval Bros., for appellant.

Ivan A. Blevens, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SIMMONS, C. J.

This is an action for divorce, alimony, child support, and a division of property. Plaintiff pleaded "extreme cruelty" as a cause for divorce without any allegation other than that phrase.

Defendant filed, in effect, a general denial and prayed for the custody of the children.

At the beginning of the trial, it was stated that plaintiff's petition for divorce and child custody would not

be contested; and that the parties had "been unable to settle their differences so far as property rights, alimony and child support were concerned." In short, the parties told the court that only a "prima facie" case for divorce and child custody would be made and that the contested issue would be limited to the property phases of the divorce.

Trial was had. The court granted the plaintiff an absolute divorce and the custody of the children, with rights of visitation to the defendant; allowed child support and alimony; and made a property division. The defendant's attorney withdrew as counsel the day the decree was entered. Defendant then employed present counsel. He presents here on appeal error in the granting of the divorce and error in awarding an excessive amount of alimony. Plaintiff states here that only the question of alimony and property division is involved in this appeal. She relies on the agreement made before the trial.

We reverse the decree of the trial court and remand the cause of action with directions to dismiss.

There were four children born to this union, three of whom are at home, one is married and lives separately.

The parties were married while defendant was in veterinary school. Plaintiff worked before and after the first child came and contributed to the support of defendant. Apparently, defendant, early in the marriage period, began the practice of his profession at Seward. There a home was built and improved. With the exception of several small payments by plaintiff, defendant paid off the mortgage on the home and furnished it. At the time of the trial, the taxes were delinquent 2 years.

Defendant moved his veterinary offce to Milford. About 8 years before the trial, he went on vacation and did not return to live at the family home in Seward. He has paid for board and room at one place in Milford for 7½ years. No improper conduct is shown.

During this period of time, defendant returned home once a week, purchased groceries on a list prepared by plaintiff, repaired appliances, did other chores, and visited with his children. How long he stayed at home on week-ends does not appear.

On several occasions, he took the family on vacations, one of which was a week's duration. The relation of the plaintiff and defendant on these vacations does not appear.

Defendant conducted some farming operations at Milford. On occasion the boys would visit him there. He paid them for their labor and in that way provided some spending money. He gave the children money at birthdays and Christmas.

For the last several years plaintiff worked and contributed her earnings to the family support. Money has been scarce at times.

The only corroboration which plaintiff offers is the testimony of one son who testified that his father had not lived at home for 8 years; that his mother had worked during that time; that there were times when the family was short of money; that the defendant came home about once a week and bought "some groceries and things"; and that defendant usually paid him when he worked for him.

Section 42-335, R. R. S. 1943, provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions, or admissions of the parties, but the court shall, *in all cases,* require other satisfactory evidence of *the facts* alleged *in the petition* for that purpose." (Emphasis supplied.)

The only fact alleged in the petition is the conclusion of extreme cruelty.

Divorces by consent or collusion are not grantable in this state. The statute above quoted controls the power of the trial court and this court. Where it appears to a trial court that the required evidence is absent, it becomes the duty of the trial court to deny the divorce.

When that is not done, on appeal here, it becomes our duty to deny a divorce.

A general rule in the determination of whether or not a ground for divorce has been established is that acts asserted as grounds for divorce must be corroborated. Ivins v. Ivins, 171 Neb. 838, 108 N. W. 2d 99.

In Spray v. Spray, 156 Neb. 774, 57 N. W. 2d 926, we held: "The statutory rule that no decree of divorce and of nullity of a marriage shall be made solely on the declaration, confessions, or admissions of parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose has application alike in default and contested cases."

The rule defining extreme cruelty is: "Any unjustifiable conduct by either the husband or the wife which destroys the legitimate ends and objects of matrimony constitutes extreme cruelty as defined in section 42-302, R. R. S. 1943." Scholz v. Scholz, 172 Neb. 184, 109 N. W. 2d 156.

The corroborated evidence here falls far short of the establishment of extreme cruelty.

We have held: "In an action for divorce, even where there is no appearance by the defendant, the trial judge must be satisfied that the case is prosecuted in good faith and without collusion, and that a cause of action exists. He is not bound to accept as conclusive, in all cases, the testimony of the plaintiff, although corroborated in some minor details." Cummins v. Cummins, 47 Neb. 872, 66 N. W. 858.

The decree of the trial court is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED.

WILLIAM GORGEN, A MINOR, BY CLARA PRINCE, HIS NATURAL MOTHER AND NEXT FRIEND, APPELLANT, V. COUNTY OF NEMAHA, APPELLEE.

118 N. W. 2d 758

Filed December 28, 1962. No. 35295.

1. **Actions: Process.** An action is commenced at the date of the summons served upon the defendant or on the date on which the defendant enters a voluntary appearance.
2. **———: ———.** The plaintiff is required to file a praecipe stating the names of the parties to the action with demand that summons issue therefor.
3. **Limitations of Actions: Pleading.** Where the record shows that an action was not commenced within the time required by statute, the petition is subject to demurrer.

Appeal from the district court for Nemaha County: VIRGIL FALLOON, Judge. Affirmed.

Schrempp & Lathrop and Henry C. Rosenthal, Jr., for appellant.

Donald F. Stanley and Dwight Griffiths, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an action against the County of Nemaha, Nebraska, for damages alleged to have been caused by a defective bridge. The petition alleged that the plaintiff, William Gorgen, a minor 18 years of age who appears by his next friend, was injured on July 30, 1960, when an automobile in which he was a passenger ran off of a bridge; that the plaintiff's injuries were caused by the negligence of the defendant in failing to provide a suitable bridge, in failing to warn motorists of the existence of the bridge, in failing to provide suitable guardrails on the bridge, and in setting the bridge at an angle; and that the plaintiff was damaged as a result of his injuries. The trial court sustained a demurrer to the petition and dismissed the action. The plaintiff has appealed to this court.

The action is brought under section 39-834, R. R. S. 1943, which requires that such an action be "commenced within thirty days of the time of the injury or damage occurring; * * *." The limitation of the time within which the action must be commenced applies to all persons without regard to any kind of disability. Swaney v. County of Gage, 64 Neb. 627, 90 N. W. 542. Where the record shows that the action was not commenced within the time required, the petition is subject to demurrer. Reliance Trust Co. v. Atherton, 67 Neb. 305, 93 N. W. 150, rehearing denied, 67 Neb. 309, 96 N. W. 218.

In this state a civil action is commenced by filing a petition and causing a summons to be issued thereon. § 25-201, R. R. S. 1943. Section 25-502, R. R. S. 1943, provides: "The plaintiff shall also file with the clerk of the court a praecipe stating the names of the parties to the action with demand that summons issue therefor." Section 25-217, R. R. S. 1943, provides in part: "An action shall be deemed commenced, within the meaning of this chapter, as to the defendant, at the date of the summons which is served upon him; * * *."

The mere filing of a petition and the issuance of a summons is not the commencement of an action; the summons issued must be served upon the defendant. Reliance Trust Co. v. Atherton, *supra*. The action is commenced at the date of the summons which is served upon the defendant. Calkins v. Miller, 55 Neb. 601, 75 N. W. 1108; Burlingim v. Cooper, 36 Neb. 73, 53 N. W. 1025. Where the defendant enters a voluntary appearance, the action is commenced on the date of the appearance. Hotchkiss v. Aukerman, 65 Neb. 177, 90 N. W. 949; Reliance Trust Co. v. Atherton, *supra*.

The record shows that the following took place on August 26, 1960. The plaintiff filed a petition, which alleged that the accident occurred on July 30, 1960, and a praecipe as follows:

"PRAECIPE

Wm. Gorgen, A Minor By)	DISTRICT COURT,
Clara Prince, His Natural)	FIRST JUDICIAL
Mother and Next Friend,)	DISTRICT, IN AND
Plaintiff,)	FOR NEMAHA
vs)	COUNTY
THE COUNTY OF)	
NEMAHA,)	Doc Q Page 284
Defendant,)	No. 7908

TO THE CLERK OF SAID COURT:

Please issue Summons in the above entitled cause and deliver same to the Sheriff of said County;

John W. Magor—Auburn
Frank Clark—Nemaha
Adolph Kienker—Johnson

Schrempp & Lathrop
Attorney for Pltf."

A summons was issued for service upon "John W. Magor—Auburn," "Frank Clark—Nemaha," and "Adolph Kienker—Johnson," and was served personally upon John W. Magor, Frank Clark, and Adolph Kienker.

Magor, Clark, Kienker, and the defendant all filed special appearances which were sustained on October 18, 1960. The plaintiff did not appeal from the orders sustaining the special appearances. On October 11, 1961, approximately a year later, the plaintiff filed a praecipe requesting that an alias summons be issued.

The record in this case shows that the action was not commenced within the time limited by statute. Although the petition was filed within the 30-day period, there was no summons issued for the defendant which was served upon it. The summons which was issued and served on August 26, 1960, was not directed to or served upon the defendant. Magor, Clark, and Kienker were not parties to the action and the service of the summons upon them as individuals accomplished nothing. The trial court acquired no jurisdiction over

the defendant by the summons issued and served on August 26, 1960.

The plaintiff argues that a party is not obliged to supervise the preparation of the summons and is not responsible for a dereliction of an officer of the court. The argument is not applicable to the facts in this case. The summons which was issued in this case responded to the praecipe which the plaintiff filed. The difficulty lies in the fact that the praecipe was defective. It was the plaintiff's responsibility to file a praecipe "stating the names of the parties to the action with demand that summons issue therefor." § 25-502, R. R. S. 1943. The praecipe should have requested that a summons be issued for the defendant, the County of Nemaha, Nebraska.

The demurrer was properly sustained and the action dismissed. It is unnecessary to consider the other ground urged in support of the demurrer.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF GUSTAV OST, DECEASED.
FRIEDA LEU, APPELLANT, V. J. R. SWENSON ET AL., APPELLEES.
119 N. W. 2d 68

Filed December 28, 1962. No. 35302.

1. **Wills: Appeal and Error.** When an appeal is taken from a judgment of the county court denying the admission of a will to probate, the party appealing is required to file a petition on appeal within 50 days from the date of the rendition of such judgment unless the court, on good cause shown, shall otherwise order.
2. **Appeal and Error.** Whether or not good cause is shown to permit a filing of the petition out of time in such a case is a question of fact. The finding and judgment of the trial court thereon will not ordinarily be disturbed on appeal unless an abuse of discretion is shown.

3. ———. In such a case this court will assume that the finding and judgment of the trial court are correct in the absence of a bill of exceptions.
4. ———. When a court reporter is unable to prepare and certify a bill of exceptions, a bill of exceptions shall be prepared under the direction and supervision of the trial judge upon request and shall be certified by the judge and delivered to the clerk of the district court, as provided by Rule 7 d, Rules of the Supreme Court.
5. ———. The action of a trial court in proceeding, over objection, with a trial or hearing without a court reporter is reversible error if the litigant is prejudiced thereby. There is no prejudice where a bill of exceptions could have been obtained under the rules of the Supreme Court if a bill had been requested.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Affirmed.

Donald S. Krause, Joseph P. Inserra, and Herbert F. Spielhagen, for appellant.

Swenson, Erickson & Westering, Wincel C. Nelson, Jr., Peter & Peter, and Edward Shafton, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an appeal from an order of the district court for Douglas County nonsuiting the appellant for failure to file a petition on appeal from the county court within time.

On April 4, 1961, Gustav Ost died, he then being a resident of Douglas County. On April 7, 1961, a petition for the appointment of an administrator was filed. On May 1, 1961, a petition for the probate of the will of Gustav Ost and for the appointment of the executrix named in the will was filed. On May 25, 1961, objections to the probate of the will were filed by William A. Peter, attorney in fact for 11 heirs of the deceased. After a hearing on the petition for the probate of the will and the objections thereto, the county court on October 10, 1961, denied the probate of the will.

On November 3, 1961, Frieda Leu, nee Frieda Bross, the named executrix in the will, appealed to the district court from the order of the county court denying the probate of the will. Notice of appeal was given and a cost bond filed. The transcript of the county court was filed in the district court on November 17, 1961.

The appellant failed to file a petition on appeal within 50 days as required by section 27-1307, R. R. S. 1943. The petition on appeal was not filed until February 19, 1962, 82 days after the statutory time allowed therefor. On February 2, 1962, William A. Peter as administrator filed a motion to dismiss the appeal. On February 19, 1962, the petition on appeal was filed. On February 26, 1962, William A. Peter as administrator filed a motion to strike the petition on appeal. On March 6, 1962, a motion to strike the motions to dismiss the appeal and to strike the petition on appeal was filed because of the want of capacity on the part of William A. Peter as administrator to make them. On March 7, 1962, a motion was filed to permit the filing of the petition on appeal, supported by the affidavit of appellant's attorney. On March 9, 1962, William A. Peter as administrator and as attorney in fact for 10 named heirs of Gustav Ost, deceased, filed a motion to strike the petition on appeal for the reason that it was filed out of time. On March 19, 1962, after a hearing, the trial court nonsuited the appellant for failure to file a petition on appeal within time. A motion for a new trial was made and overruled, and an appeal taken to this court.

The contention is advanced that, as attorney in fact for heirs of the testator, William A. Peter was not a party concerned within the meaning of section 30-217, R. S. Supp., 1961, and was therefore without authority to appear in the proceeding. An attorney in fact, authorized to represent designated heirs in a specified proceeding, stands in the shoes of such designated heirs and may exercise the powers specified in the same manner as such heirs could exercise them. As an attorney

in fact for named heirs, William A. Peter could properly move for a nonsuit or its equivalent.

The applicable statute provides in part: "If the plaintiff in the action * * * shall fail to file his petition within fifty days from the date of the rendition of such judgment * * * unless the court, on good cause shown, shall otherwise order, or otherwise neglect to prosecute to final judgment, the plaintiff shall become nonsuited; * * *." § 27-1307, R. R. S. 1943. By this statute a discretionary duty is imposed on the district court to determine whether or not good cause has been shown for the failure of a party to file a petition on appeal within the time required. In the absence of an abuse of discretion this court will not ordinarily disturb the decision of the district court. Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N. W. 2d 591; City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537; In re Estate of Myers, 152 Neb. 165, 40 N. W. 2d 536.

Whether or not good cause has been shown to permit the filing of a petition on appeal is a question of fact. There is no bill of exceptions in the instant case and consequently we must presume that the evidence sustains the finding of the trial court on the question as to whether or not good cause was shown. Lockard v. Lockard, 169 Neb. 226, 99 N. W. 2d 1; Hilligas v. Farr, 171 Neb. 105, 105 N. W. 2d 578. Numerous affidavits by the parties are contained in the transcript from the district court. It is necessary that the evidence presented at the hearing on a motion be preserved in a bill of exceptions if the ruling of the trial court on the motion is to be presented for review. Wolff v. State, 172 Neb. 65, 108 N. W. 2d 410. It is not sufficient to attach the affidavit to the motion which is made a part of the transcript. Mulder v. State, 152 Neb. 795, 42 N. W. 2d 858; Wolff v. State, *supra*. Affidavits appearing in the transcript cannot be considered. There being no bill of exceptions, there is no basis for a review of the

evidence in this court of the question as to whether or not good cause was shown.

The appellant asserts in her brief that she was unable to obtain a bill of exceptions for the reason that no court reporter was available, that she demanded a court reporter to transcribe the evidence, and that the trial court ordered the hearing to proceed without a court reporter being present. While there is no record before us establishing the foregoing facts, we shall for the purpose of the following discussion assume their correctness.

A court reporter is an officer of the court enjoined by statute to perform the duties provided in section 24-340, R. R. S. 1943. Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151. Where a case is tried for any reason without the presence of a court reporter and the means of providing a bill of exceptions exists, the failure to provide a court reporter is not reversible error unless the litigant is prejudiced. Home Fire Ins. Co. v. Johnson, 43 Neb. 71, 61 N. W. 84; Ripley v. Godden, *supra*.

The preparation and certification of bills of exceptions in this state are governed by rule of the Supreme Court. § 25-1140, R. S. Supp., 1961. There is no statute or rule of court which makes the preparation and certification of a bill of exceptions the exclusive duty of the official court reporter. Under Rule 7 d of the rules of this court, when a court reporter is not present, the trial judge is authorized to have a bill of exceptions prepared under his direction and supervision which shall be certified and filed by him with the clerk of the district court. Peterson v. Skiles, 173 Neb. 223, 113 N. W. 2d 105. The appellant does not contend that she requested or demanded a bill of exceptions as provided by the rules of this court.

The record before us indicates that the motions of the parties were supported by affidavit, although the briefs show that oral evidence was adduced at the trial. A bill of exceptions could have been obtained. There is nothing to indicate that a bill of exceptions so ob-

tained would have prejudiced the rights of litigants. We think this point is controlled by Peterson v. Skiles, *supra,* which holds, as shown by the syllabus, as follows: "When a court reporter is unable to prepare and certify a bill of exceptions, a bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the clerk of the district court, all as provided by Rule 7 d, Rules of the Supreme Court."

It necessarily follows that this court cannot review the findings of the trial court on the question of good cause for the reason that the evidence pertaining thereto is not before the court. Under such circumstances it will be presumed that the order of the trial court finding that good cause did not exist for filing the petition on appeal out of time was sustained by the evidence.

AFFIRMED.

IN RE ESTATE OF MARTIN F. LEWIN, DECEASED. MARJORIE L. LEWIN, APPELLANT, V. INEZ LEWIN ET AL., APPELLEES.

119 N. W. 2d 96

Filed December 28, 1962. No. 35334.

1. **Pleading.** A motion to strike a petition from the files because the facts pleaded are insufficient is in effect a general demurrer and admits the truth of facts well pleaded.
2. ———. A petition may properly be stricken where it appears that its fatal defects extend to the pleading as a whole. A petition that shows on its face that a cause of action cannot be stated by amendment is such a pleading.
3. **Courts.** A court will take judicial notice of pleadings, orders, and judgments appearing in the record of the case it has before it.
4. **Wills: Courts.** The county courts of this state have exclusive original jurisdiction in all matters of probate and the settlement of estates of deceased persons by virtue of Article V, section 16, Constitution of Nebraska.
5. **Courts.** Jurisdiction of the subject matter is the power to hear

and determine cases of the general class to which the proceeding belongs.

6. ———. Where a court has jurisdiction of the subject matter, it has the power to determine by evidence whether or not the venue is established.

7. Courts: Judgments. Where a county court having jurisdiction of the subject matter determines from evidence that the venue of the action has been established and enters its judgment to that effect, such judgment, if no appeal is taken therefrom, is a final adjudication of the issue.

Appeal from the district court for Valley County: DONALD H. WEAVER, Judge. Affirmed.

F. C. Radke, for appellant.

Schaper & Schaper, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an appeal from an order of the district court for Valley County striking the petition and dismissing an action attacking the validity of the proceedings for the probate of the will of Martin F. Lewin, deceased.

The plaintiff is Marjorie L. Lewin, the widow of the deceased. The defendants are Inez Lewin, the mother of the deceased, and Jack Devoe, a Lincoln attorney, who were named in the will as coexecutors. The petition alleges that the defendants filed a petition for the probate of the will of Martin F. Lewin in the county court of Valley County on May 19, 1960, alleging that deceased at the time of his death was a resident of Valley County when in fact he was a resident of Lancaster County. It is the contention of plaintiff that the county court of Valley County was without jurisdiction to probate the will of Martin F. Lewin, deceased, under the provisions of section 30-213.01, R. S. Supp., 1961, and that the purported probate proceeding in the county court of Valley County is wholly void and of no force and effect.

The history of the litigation is substantially as follows: The petition for the probate of the will of Martin F. Lewin, deceased, was filed in the county court of Valley County on May 19, 1960. Notice of hearing on the petition was duly published in a legal newspaper in Valley County and a copy of the notice was mailed to all known persons who were interested, including the plaintiff, Marjorie L. Lewin. On June 13, 1960, a hearing on the petition was held at which plaintiff and her attorney were present. No objections to the probate of the will were filed. Evidence was taken and the will admitted to probate. The order admitting the will to probate provided in part: "* * * the Court finds that the said Martin F. Lewin, deceased, died on April 20, 1960, and that at the time of his death he was a resident of Valley County, Nebraska, and that the said Martin F. Lewin, deceased, died seized of an estate consisting of both real and personal property in Valley County, Nebraska." No appeal was taken from this order.

After the entry of the order of the county court admitting the will to probate, and long after the time for appeal had expired, plaintiff filed her petition in the district court alleging that the county court of Valley County was without jurisdiction in the probate proceeding under the provisions of section 30-213.01, R. S. Supp., 1961, in that Martin F. Lewin at the time of his death was a resident of Lancaster County and not a resident of Valley County as found by the county court.

Defendants moved to strike the petition for the reason that the judgment of the county court was final and conclusive and not vulnerable to the attack made upon it. The trial court sustained the motion and dismissed the action. A motion for a new trial was filed and overruled. Plaintiff perfected her appeal to this court.

The plaintiff contends that the motion to strike should be treated as a demurrer. We agree with this contention. Brandeen v. Beale, 117 Neb. 291, 220 N. W. 298;

Reller v. Ankeny, 160 Neb. 47, 68 N. W. 2d 686. The motion to strike contains a recitation of the record made in the county court. A recitation of facts constituting a defense is not proper to be included in a motion to strike and they will be disregarded in this court. Since the facts asserted are contained in the transcript of the proceedings of the county court, this court will take judicial notice of them. State ex rel. Johnson v. Wagner, 139 Neb. 471, 297 N. W. 906. Plaintiff contends that this court cannot properly go to the transcript for facts that support a sustaining of the demurrer. We agree that we cannot supply evidence from the transcript, but we can take judicial notice of the pleadings, orders, and judgments shown in the record.

Section 30-213.01, R. S. Supp., 1961, provides: "Whenever any person shall die testate, being an inhabitant or resident of this state at the time of his death, the county court of the county of which said decedent was an inhabitant or resident at the time of his death shall have exclusive jurisdiction over the proceedings for the probate of the last will and testament of such decedent and to prove and allow or disallow the same." On the basis of this section of the statute the plaintiff contends that Martin F. Lewin was actually a resident of Lancaster County at the time of his death, that the county court of Valley County did not therefore have jurisdiction of the subject matter, and that the probate proceeding is wholly void.

The county courts of this state have exclusive original jurisdiction in all matters of probate and the settlement of the estates of deceased persons. Art. V, sec. 16, Constitution of Nebraska. The county court of Valley County therefore had jurisdiction of the subject matter upon the filing of the petition for the probate of the will of Martin F. Lewin, deceased, in that court. Jurisdiction of the subject matter is defined in a recognized text as follows: "Jurisdiction of the subject matter is the power to hear and determine cases of the general

class to which the proceedings in question belong; the power to deal with the general subject involved in the action; and means not simply jurisdiction of the particular case then occupying the attention of the court but jurisdiction of the class of cases to which the particular case belongs, the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to determine." 21 C. J. S., Courts, § 23, p. 36. See, also, 14 Am. Jur., Courts, § 191, p. 385. The filing of the petition for the probate of the will of Martin F. Lewin, deceased, is within the subject matter granted to county courts by the cited constitutional provision. The place of decedent's death does not affect the subject matter of the proceeding.

The question raised by plaintiff is one of venue and not jurisdiction in the strict sense of the term. The question of venue is one of fact which a court having jurisdiction of the subject matter is empowered to hear and determine. The county court in the present case found upon the evidence adduced that Martin F. Lewin was a resident of Valley County at the time of his death. The order of the county court admitting the will to probate so shows. The necessary facts were found to exist to fix the venue of the proceeding in Valley County. No appeal having been taken, the order of the county court admitting the will to probate became a final adjudication and not subject to the attack plaintiff makes upon it. The venue of the proceeding has been finally adjudicated. No question of fraud by an interested party in procuring the judgment is claimed. Plaintiff merely asserts that the facts as to venue were different than as found by the county court upon the evidence submitted. The issue is clearly res judicata.

The reasoning supporting the rule is well stated in Scudder v. Evans, 105 Neb. 292, 180 N. W. 254, in the following language: "The question is whether a decree of probate should be set aside on application made more

than a year after its rendition upon the sole ground that a witness, not a party to the proceedings, or in any wise interested therein, so far as the evidence shows, testified falsely at the hearing. An extended experience of the general inaccuracy of observation and of the frailty of human nature as exhibited on the witness stand convinces the writer that, if judgments may be opened up and set aside on the sole ground that testimony given at the hearing was false or even perjured, then comparatively few judgments would be conclusive. It is in the highest degree essential to the welfare of the community, and to the respect which should be given to and the confidence which ought to exist in the judgments of a court, that they should not be set aside unless upon the strongest and most convincing grounds. Since the title to much of the real estate in the state depends upon the conclusiveness of a decree of probate, it is evident that it ought not to be set aside except for the strongest of reasons and in accordance with established rules. It is seldom, indeed, that a judgment may be opened on account of perjured testimony. It is only when an interested party may have participated in, or conspired to commit, a fraud upon the court."

Plaintiff next contends that the sustaining of the motion to strike does not warrant the dismissal of the action. The plaintiff did not request time to further plead and treated the dismissal as a final disposition of the issue raised. In her motion for a new trial no error is asserted for failure of the court to permit the filing of an amended pleading. Finally, it appeared on the face of the petition that a cause of action was not stated and that a cause of action could not be stated on the point raised.

In Ferson v. Armour & Co., 109 Neb. 648, 192 N. W. 125, this court said: "It (a petition) may be stricken from the files, if fatal defects extend to the pleading as a whole, or if plaintiffs in filing it ignored an order

of the court." A petition which shows on its face that a cause of action could not be stated by amendment appears to be within the foregoing rule. Plaintiff was in no manner prejudiced by the dismissal, it being the only result at which the trial court could arrive in any event.

For the reasons stated the judgment of the district court is correct and its judgment is affirmed.

AFFIRMED.

IN RE ESTATE OF DAISY CORYELL, DECEASED.
MARTIN A. KATT ET AL., APPELLEES, V. LORRAINE LELAND CORYELL CLAUSSEN, APPELLANT, IMPLEADED WITH PEARL PARKER ET AL., APPELLEES.
118 N. W. 2d 1002

Filed January 4, 1963. No. 35258.

1. **Wills.** The fact that a will expresses the intention of the testator to disinherit certain persons does not prevent such persons from sharing as heirs-at-law or next of kin in property as to which the testator died intestate.
2. ———. Ordinarily a class gift is a gift to two or more persons who are not named and who have one or more characteristics in common by which they are indicated or who answer to a general description.
3. ———. If the gift is made to beneficiaries by name, the gift is, prima facie, not one to a class, even if the individuals who are named possess some quality or characteristic in common. This is particularly true if the beneficiaries are not described as having some quality or attribute in common.
4. ———. The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself in the light of attendant circumstances under which it was made.
5. ———. It is a natural presumption that a testator making his will intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption has weight, but it cannot supply the actual intent of the testator to be derived from the language of the will.
6. ———. In construing a will a court is required to give effect

to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded.

Chambers, Holland, Dudgeon & Hastings, for appellant.

Davis, Thone, Bailey & Polsky, Healey & Healey, and Jacobs & Bennion, for appellees Parker et al.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This action involves the construction of the codicil to the last will and testament of Daisy Coryell, deceased, who will hereinafter be referred to as Daisy. The deceased husband of Daisy, L. L. Coryell, Sr., who will hereinafter be referred to as Coryell, Sr., was the sole beneficiary of Daisy's last will and testament, which was executed February 9, 1950. The Coryells had reciprocal wills and Daisy was named as the sole beneficiary of the estate of Coryell, Sr. On April 15, 1950, Daisy executed a codicil to her last will and testament providing for the contingency of the death of her husband. Coryell, Sr., also executed a like codicil to cover the contingency of Daisy predeceasing him. Daisy survived and was the sole beneficiary of the Coryell, Sr., estate. Daisy's last will and testament and codicil were admitted to probate November 5, 1959.

The pertinent provisions of the codicil are as follows: "FIRST: One-half of all of my property, both real and personal to 'L. L. Coryell & Son Park Foundation, Incorporated' and one-half to my two sisters Pearl Parker and Myrtle Miller, and my husband's niece Mary Bailey share and share alike.

"SECOND: I make no bequest to my granddaughter Lorraine L. Coryell for the reason that she has been

amply provided for through an Insurance Trust."

The codicil contained no residuary clause. Lorraine L. Coryell Claussen, the granddaughter of Daisy, hereinafter referred to as Lorraine, is her sole and only heir in the absence of a will. The Insurance Trust referred to was set up by Lorraine's father, L. L. Coryell, Jr., in 1942. Coryell, Sr., died November 19, 1953. Myrtle Miller, Daisy's sister, hereinafter referred to as Myrtle, died April 8, 1959. Daisy died September 17, 1959, just a little over 5 months later. In addition to her granddaughter and sister, Daisy was also survived by a brother, Glenn Parker. In addition to Mary Bailey, three nephews and one other niece of Coryell, Sr., survived Daisy. Pearl Parker and Mary Bailey were single women and Myrtle Miller was a childless widow. Glenn Parker, the brother of Daisy, who is one of the appellees, is assignee of one-half of whatever interest Pearl Parker may acquire because of the death of her sister Myrtle.

After the death of Coryell, Sr., in 1953, a dispute arose as to the right of Coryell, Sr., and Daisy to execute the wills of 1950. Lorraine and her mother, Lorraine B. Coryell, claimed rights under joint and reciprocal wills executed by their father and husband, and Coryell, Sr., Daisy, and Lorraine B. Coryell in October 1942. A settlement was made by Daisy as executor of the estate of Coryell, Sr., and personally, whereby Lorraine and Lorraine B. Coryell were paid $50,000 in cash and were conveyed a remainder interest in a farm in Nemaha County valued at $25,000. This transaction was consummated on February 9, 1954, at which time a receipt and final release and discharge was signed by Lorraine and Lorraine B. Coryell. The part of the release pertinent to this inquiry is as follows: "* * * the undersigned Lorraine B. Coryell and Lorraine L. Coryell hereby release and forever discharge any and all claims, demands and actions, rights, benefits and/or anything of value now due them or that may become due them or either of them from the estate of L. L. Coryell, Sr.,

deceased, and from Daisy Coryell individually and from the estate of Daisy Coryell after her death that may be due them or either of them now and at any time in the future *by reason of the said joint, mutual and/or reciprocal Wills alleged to have been executed by the said L. L. Coryell, Sr., deceased, Daisy Coryell, L. L. Coryell, Jr., deceased, and Lorraine B. Coryell.*

"It is further understood and agreed by any and all concerned that the settlement and payments made hereunder is a full, complete and final settlement now and for all time and the considerations are paid the said Lorraine B. Coryell and Lorraine L. Coryell, her daughter, to end for all time any future claims, demands and/or actions or future litigation against the estate of L. L. Coryell, Sr., deceased, and against Daisy Coryell individually and against the estate of Daisy Coryell after her death and against any of the respective representatives thereof, *by reason of the contentions concerning the alleged joint, mutual and/or reciprocal Wills above mentioned.*" (Italics supplied.)

It is evident that in the event Coryell, Sr., predeceased her, Daisy divided her estate into two halves. One she gave to L. L. Coryell & Son Park Foundation, Incorporated. As to this provision there is no question herein. The other portion she divided, share and share alike, among three designated persons, two related to her by blood and the other a niece of her deceased husband. There can be no question but that Daisy intended to dispose of her entire estate, and if she had died previous to April 8, 1959, she would have done so. The difficulty arises because she was predeceased by her sister Myrtle, one of the beneficiaries. The anti-lapse statute, section 30-228.03, R. R. S. 1943, is not operative because Myrtle, who was related to Daisy, was not survived by issue.

It is appellees' contention that the provision for Myrtle did not lapse for three reasons: First, it was a class gift; second, because Lorraine cannot take be-

cause of the release and settlement; and, third, because Lorraine was specifically disinherited by the codicil. We will discuss these contentions in inverse order.

Daisy stated she was making no provision for Lorraine because she was provided for through an insurance trust. We do not construe this provision to be an attempt to disinherit or to exclude Lorraine, but rather as an explanation as to why no provision was being made for her in the will. However, even if we were to so construe it, which we do not, and to hold that the provision for Myrtle lapsed, then under our holding in Kula v. Kula, 149 Neb. 347, 31 N. W. 2d 96, Lorraine would still inherit. In that case, the testator said in his will: " 'THIRD: It is my sincere wish, desire and intention that my sons, namely, Thomas Kula, Joseph Kula and Richard Kula, receive nothing under this my Last Will and Testament, for the reason that they have received their proportionate share of my property during my life time.' " This was specifically an intent to exclude the named individuals. We held in that case as follows: "The fact that a will expresses the intention of the testator to disinherit certain persons does not prevent such persons from sharing as heirs at law or next of kin in property as to which the testator died intestate." This rule is controlling on appellees' third contention.

Appellees' second contention is so obviously incorrect that we will consider it only briefly. It should be evident from the portions of the release set out above, particularly the portions italicized, that the settlement was restricted to rights accruing under the joint and reciprocal wills executed in 1942. The dispute concerned the right of Daisy and Coryell, Sr., to execute new wills after the death of Lorraine's father, whose will was executed pursuant to the agreement culminating in the 1942 wills. The settlement agreement does not in any way reflect an intention to settle any rights of inheritance which might accrue subsequently because of the blood relationship of the parties.

This brings us to the only real point in issue. Did Daisy create a class gift? Ordinarily, a class gift is a gift to two or more persons who are not named and who have one or more characteristics in common by which they are indicated or who answer to a general description. As we said in Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713: "A gift to a class is a gift to a number of persons not individually named, but all answering a general description." In that case, quoting in part from Thompson on Wills (2d ed.), § 306, p. 384, we also said: " 'Where the testator clearly intends that his gift shall pass to the beneficiaries as a class, there is no lapse by reason of the death of any one of them before the class is determined. The death of one member of the class before the testator will not occasion a lapse of any part of the gift, but those of the class who survive the testator will take the whole. * * * *When, however, the parties to whom a legacy is given are not described as a class, but by their individual names, though they may constitute a class, the death of any one of them, before the testator, causes a lapse of the legacy intended for the legatee so dying.*' " (Italics supplied.)

It is possible, however, that the names of the prospective beneficiaries may be given and yet the gift may be to a class. We have such a situation in In re Estate of Zimmermann, 122 Neb. 812, 241 N. W. 553. There the testator gave nominal bequests to his children living with their mother, his divorced wife. The residue of his estate he devised and bequeathed to the two sons who had helped accumulate the estate and who have lived with him and apart from the rest of the family for several years. It was evident that the special situation present in that case clearly indicated the creation of two distinct classes even though the individual members were specifically named.

In those cases in which a class gift has been found where the beneficiaries are specifically named, the context of the instrument usually indicates that the names

of the beneficiaries were added to the description of them as members of a class for the purposes of greater certainty of identification, and that the paramount intention of the testator was to make a gift to a class.

The general rule is well expressed in 4 Page on Wills (Bowe-Parker Revision), § 35.4, p. 495: "If the gift is made to beneficiaries by name, the gift is, prima facie, not one to a class, even if the individuals who are named possess some quality or characteristic in common. This is particularly true if the beneficiaries are not described as having some quality or attribute in common."

Clearly in the instant situation the will discloses no quality or attribute that all of the beneficiaries possess in common except that of being females, and there were omitted relatives who would also be in this category. The individuals are specifically named and no mention is made of a class. There is no description of any nature, general or otherwise, from which it could even be inferred that a class was intended.

Appellees argue that the Coryells were obviously thinking of their closest single female relatives (two of the beneficiaries were unmarried women and the other was a childless widow) other than Lorraine, as a group, when they executed the codicils, and they contend this is strengthened by the provision relating to Lorraine. Even if it was conceded that they had them in mind because of their status, certainly it is not evident that because of that fact the Coryells intended to create a class gift. They undoubtedly wished to provide some measure of security for the individuals named. This they did by giving them each a one-sixth of the estate. It is not apparent, however, because they did so that they wished the individuals named to have more than the portion of the estate actually given to them. The codicil was not drawn by someone ignorant of the law but was drawn by an experienced lawyer who could not help but be familiar with the general rule set out above. While the Coryells may have considered that one-sixth

of the estate was necessary to provide the desired security for the individuals named, they might have had other ideas if they had been told the one-sixth could be increased by the death of any of the named beneficiaries. It is not the province of the courts by construction to supply omissions or to write residuary clauses for testators who neglect to do so. The object and purpose of the court is to carry out and enforce the true intention of the testator *as shown by the will itself* in the light of attendant circumstances under which it was made. In re Estate of Dimmitt, 141 Neb. 413, 3 N. W. 2d 752, 144 A. L. R. 704.

It seems clear to us that we would be doing violence to established rules of law if we were to read qualities and attributes into the will sufficient to create a class and then to hold that the individuals were specifically named to help identify the class. To do so would be to make a will for the testator which she might or might not have made if her attention had been specifically directed to the possibility of lapsation.

There is no claim asserted that there is any ambiguity in the codicil. The persons involved are specifically named and their relationship is clearly stated. The point to be construed is whether Daisy contemplated the fact that any or all of the beneficiaries might predecease her and intended to cover that eventuality. To meet this point, appellees argue, as we said in Attebery v. Prentice, 158 Neb. 795, 65 N. W. 2d 138: "There is a presumption that a testator intended to dispose of his entire estate and not to die intestate either as to the whole or as to any part thereof. Where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if, by a reasonable construction, it can be avoided." To this we must reply that such presumption is not a rule of law but is merely a construction aid to determine but not to supply the intent of the testator.

We said in Jacobsen v. Farnham, 155 Neb. 776, 53 N. W. 2d 917, 33 A. L. R. 2d 543: "It is a natural presumption that a testator making his will intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption has weight, *but it cannot supply the actual intent of the testator to be derived from the language of the will.*" (Italics supplied.) In that case we also said: "In construing a will a court is required to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law." This means we are to determine what the testator actually intended to do and not what we think testator might have done if his attention had been directed to a possible contingency.

In the earlier case of Hunter v. Miller, 109 Neb. 219, 190 N. W. 583, we said: "It is further true that there is a presumption that the testator intended to devise all of his property, and did not intend to die intestate as to any part of it, but that presumption is not stronger than the other presumption, which is, that a testator will not be held to have disinherited an heir except where that conclusion is impelled by the express provisions or by necessary implication from provisions specifically set forth." As suggested, we do not construe the "Second" proviso of the codicil as an express intent to disinherit Lorraine but rather as an explanation as to why no provision was made for her as the will was drawn.

We hold that no class gift is involved; that Daisy died intestate as to the portion of the estate devised and bequeathed to Myrtle; and that Lorraine as her sole and only heir inherits all intestate property.

For the reasons given, we reverse the judgment entered herein and remand the cause with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED.

IN RE FRED M. HANS, JR., A MINOR CHILD.
STATE OF NEBRASKA EX REL. KENNETH WEINER, DEPUTY COUNTY ATTORNEY OF DOUGLAS COUNTY, NEBRASKA, APPELLEE, V. FRED M. HANS, JR., A MINOR CHILD, APPELLANT.
119 N. W. 2d 72

Filed January 4, 1963. No. 35265.

1. **Courts.** Where a court has been established by an act of the Legislature, apparently valid, and the office has been filled and the court has gone into operation, it is to be regarded as a de facto court and its acts and judgments cannot be impeached collaterally for want of legality in the court itself, nor its legal existence questioned except in a direct proceeding brought for that purpose.
2. **Constitutional Law: Courts.** Constitutionality of separate juvenile court of Douglas County, Nebraska, is not determined.
3. **Juries: Infants.** A defendant is not entitled to a jury trial upon a complaint filed in the juvenile court alleging that the defendant is a delinquent child.
4. **Trial: Appeal and Error.** The admission of immaterial or irrelevant evidence in a trial to the court is not reversible error.
5. **Infants: Appeal and Error.** A proceeding under the Juvenile Court Act is a special statutory proceeding and the review in this court of such a proceeding is by trial de novo.
6. **Appeal and Error.** Upon a review in this court by trial de novo this court will disregard evidence which should not have been admitted by the trial court in a trial to the court.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed.

Nanfito & Nanfito and Doerr & Doerr, for appellant.

Clarence A. H. Meyer, Attorney General, Melvin K. Kammerlohr, John J. Hanley, and Donald L. Knowles, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

A complaint was filed in the separate juvenile court of Douglas County, Nebraska, by a deputy county attor-

ney of Douglas County, Nebraska, alleging that Fred M. Hans, Jr., the defendant and appellant was a neglected and delinquent child. A hearing was held on the complaint, and the defendant was adjudged to be a delinquent child and was committed to the Boys' Training School at Kearney, Nebraska. The defendant's motion for new trial was overruled and he has appealed to this court.

In 1958 the Constitution of Nebraska was amended to provide that the Legislature may establish separate juvenile courts. Art. V, § 27, Constitution of Nebraska. In 1959 the Legislature enacted a statute providing for the establishment of separate juvenile courts in counties having a population of 50,000 or more inhabitants when authorized by a majority of the electors of the county voting thereon. § 43-228, R. R. S. 1943. The defendant's first contention is that the trial court had no jurisdiction because the statute providing for the establishment of a separate juvenile court in Douglas County, Nebraska, is unconstitutional.

The position of the Attorney General is that the question of the validity of the Separate Juvenile Court Act cannot be raised in this proceeding, but can be raised only in a separate action brought for that purpose. Thus, the first question presented is not the validity of the Separate Juvenile Court Act, but whether the validity of that act can be determined in this proceeding.

The general rule is that the title to an office can be litigated only in a proceeding brought directly for that purpose, and cannot be determined by a collateral attack in another proceeding. Haskell v. Dutton, 65 Neb. 274, 91 N. W. 395; Von Dorn v. Mengedoht, 41 Neb. 525, 59 N. W. 800. A person who exercises the duties of an office under color of an election or appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such, is a de facto officer. McCollough v. County of Douglas, 150 Neb. 389, 34 N. W. 2d 654; Prucka v. Eastern Sarpy Drainage Dist., 157

Neb. 284, 59 N. W. 2d 761. The acts and judgments of a de facto officer are as valid and binding as though performed and rendered by an officer de jure. Dredla v. Baache, 60 Neb. 655, 83 N. W. 916; State v. Kidder, 169 Neb. 181, 98 N. W. 2d 800.

Where a court has been established by an act of the Legislature, apparently valid, and the office has been filled and the court has gone into operation, it is to be regarded as a de facto court and its acts and judgments cannot be impeached collaterally for want of legality in the court itself, nor its legal existence questioned except in a direct proceeding brought for that purpose. Burt v. Winona & St. P. R. R. Co., 31 Minn. 472, 18 N. W. 285. See, also, State v. Ness, 75 S. D. 373, 65 N. W. 2d 923; Gildemeister v. Lindsay, 212 Mich. 299, 180 N. W. 633; State ex rel. Madden v. Crawford, 207 Ore. 76, 295 P. 2d 174.

So far as this proceeding is concerned, the jurisdiction of the trial court did not depend upon the validity of the Separate Juvenile Court Act. Consequently, no issue could be raised in this proceeding concerning the validity of the statute. It is unnecessary for us at this time to consider further the contentions of the defendant regarding the validity of the act and we make no determination of them.

The defendant also contends that the trial court erred in failing to grant the defendant a jury trial, in permitting the complainant to subpoena an accomplice for the purpose of being identified by the witnesses for the complainant, and in finding the defendant to be delinquent at the close of the evidence of the complainant and before hearing the evidence of the defendant; and that the evidence is not sufficient to sustain the finding of delinquency.

The complaint alleged that the defendant was delinquent in that he was involved in the unlawful taking of an automobile on July 1, 1961, and lacked proper parental care. Prior to the hearing on the complaint

the defendant moved for a jury trial. The defendant argues that his motion should have been sustained because section 43-202, R. R. S. 1943, provides that: "In all trials under this act where a delinquent child is charged with a crime, any person interested therein may demand a jury or the judge of his own motion may order a jury to try the case; * * *."

The complaint in this case did not charge the defendant with a crime. The defendant was alleged to be a delinquent child and the allegations as to the taking of an automobile had reference only to the charge of delinquency. This question has been considered by the court previously, and it has been determined that the defendant, under such circumstances, has no right to a jury trial. Laurie v. State, 108 Neb. 239, 188 N. W. 110. See, also, Swanson v. State, 105 Neb. 761, 181 N. W. 921; State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101; Krell v. Mantell, 157 Neb. 900, 62 N. W. 2d 308, 43 A. L. R. 2d 1122; Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240; State ex rel. Miller v. Bryant, 94 Neb. 754, 144 N. W. 804; 31 Am. Jur., Juvenile Courts and Delinquent, Dependent, and Neglected Children, § 67, p. 333; 50 C. J. S., Juries, § 80, p. 788. The motion was properly overruled.

The theory of the complainant was that the defendant assisted James Gillham in the unlawful taking of an automobile. James Gillham did not testify for the complainant and the defendant complains that it was improper for the court to permit Gillham to be present and be identified by the witnesses for the complainant.

The defendant relies upon People v. Rezek, 4 Ill. 2d 164, 122 N. E. 2d 272, in support of his contention. In the Rezek case a conviction for armed robbery was reversed where the State had been permitted to have its witnesses identify some of the defendant's accomplices before the jury. In a later case, People v. Keagle, 7 Ill. 2d 408, 131 N. E. 2d 74, the Illinois court held that

where the identification of accomplices is relevant, such evidence is admissible.

The hearing before the juvenile court in this case was a trial to the court. The admission of immaterial or irrelevant evidence in a trial to the court is not reversible error. Laurie v. State, *supra*. The review in this court is by trial de novo, and evidence which should not have been admitted by the trial court will be disregarded by this court in arriving at its decision. Krell v. Sanders, 168 Neb. 458, 96 N. W. 2d 218.

At the close of the evidence of the complainant, the defendant moved that the complaint be dismissed and argued the motion to the trial court. The trial court then announced that the motion was overruled, and the following occurred: "THE COURT: * * * At this time the Court finds that Fred M. Hans, Jr., is a delinquent child as alleged. . . . MR. NANFITO: If the Court please, I do not wish to interrupt the Court, but at this point the defense has not presented its case. THE COURT: I am sorry, Mr. Nanfito. I was under the impression that you did not wish to present evidence and I withdraw my last remark."

The defendant argues that this excerpt from the record shows that the trial court prejudged the defendant; that the trial court would have found that the defendant was a delinquent child without regard to any evidence that the defendant might have produced; and for that reason the defendant did not have a fair trial. We think the defendant assumes too much.

The record shows that the trial court, by inadvertence, thought that the defendant did not intend to introduce any evidence. If that had been true, it would have been proper for the trial court to announce its finding after all of the evidence had been heard. When the defendant advised the trial court that he intended to introduce evidence, the court promptly withdrew its statement. The record does not establish that the defendant did not have a fair trial.

The complainant produced evidence by two eyewitnesses that the defendant, with James Gillham, pushed an automobile owned by a third party approximately 5 or 6 blocks from where it had been parked before being apprehended. When apprehended by the two eyewitnesses and the owner of the automobile, the defendant was using his automobile to push the other automobile which was being driven by Gillham. The defendant did not deny that he was present, but testified that a stranger had asked him to push the automobile. Gillham testified that he was not with the defendant at the time in question and that he did not participate in the taking of the automobile.

The evidence establishes that the defendant participated in the taking of an automobile without the consent of the owner. This is sufficient to permit a finding of delinquency. § 43-201, R. S. Supp., 1961.

The defendant was 16 years of age at the time of trial and lives with his father, Fred Hans, Sr. The defendant's mother died in 1958. The defendant has five sisters, none of whom are living at home. The defendant's father is a construction worker and was working out of town at the time the complaint was filed. The defendant's father testified that he had been living at his house in Omaha off and on, and had "just moved in there recently to take care of" the defendant.

Although not directly raised by the defendant, we have given some consideration to the question as to whether the defendant should have been committed to the Boys' Training School. The finding of delinquency in this case rests upon proof of a single violation. The juvenile court has a broad discretion as to the disposition of a child found to be delinquent. § 43-210, R. R. S. 1943.

The defendant's father testified that the defendant was in jail for 5 or 6 days on one occasion. The record does not show whether that was in connection with the July 1, 1961, incident or some other occasion. Also, the

record does not contain whatever evidence that may have been before the court at the time of the disposition hearing. In view of the state of the record, we have concluded that this court should not interfere with the determination of the trial court with respect to the disposition of the defendant.

The judgment of the trial court is affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

I dissent from that part of the court's opinion that approves the denial of a jury trial. The rule adopted permits the prosecution to elect whether the accused shall have a jury trial or a trial by the court. The facts charged constitute a felony. By the device of charging that the accused is a delinquent and not a criminal, a jury trial is denied. The substance of the offense and not the form of the charge should control. The liberty and reputation of a person is involved. Youth as well as maturity are entitled to the benefits of the jury system. The statute and the Constitution so provide.

FRANCES J. HERNDON, APPELLEE, V. BRYCE CRAWFORD ET AL., APPELLANTS.
119 N. W. 2d 82

Filed January 4, 1963. No. 35287.

1. **Damages: Trial.** The future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person.
2. **Damages: Appeal and Error.** An instruction on the measure of damages permitting recovery for future pain and suffering when there is no competent evidence to support the same is prejudicial error.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Reversed and remanded.

Haney & Walsh, for appellants.

Schrempp & Lathrop, S. J. Albracht, and Henry C. Rosenthal, Jr., for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The plaintiff, Frances J. Herndon, brought this action at law to recover damages for personal injuries sustained by her when the automobile of the defendants, Bryce Crawford and Mary B. Crawford, driven by Mary B. Crawford, backed out of a parking place at the Countryside Village Shopping Center in Omaha and collided with the back end of an automobile in which the plaintiff was sitting. The case was tried to a jury resulting in a verdict for the plaintiff in the amount of $1,500. The defendants' motion for judgment notwithstanding the verdict or in the alternative for a new trial was overruled. The defendants perfected appeal to this court.

The plaintiff's amended petition alleged in substance that the plaintiff was sitting in a 1955 Pontiac automobile owned by her husband, Earnest Herndon, when the defendant Mary B. Crawford negligently backed into the automobile in which the plaintiff was sitting; and that the injuries resulting to the plaintiff were occasioned as a direct and proximate result of the negligence of the defendants, and each of them, in failing to keep a proper lookout for automobiles parked in the parking place, and in particular the automobile in which the plaintiff was sitting, and in failing to give any notice of the defendant Mary B. Crawford's approach to the automobile in which the plaintiff was sitting. The amended petition then described the injuries which the plaintiff allegedly sustained, and alleged that the plaintiff was forced to spend $417 for hospitalization, $50 for medical treatment, and loss of wages in the amount of $810.

The plaintiff's husband assigned in writing his cause of action to the plaintiff.

The defendants, by answer to the plaintiff's amended petition, denied that they were guilty of any negligence that caused or contributed to the alleged accident, and alleged that the collision was caused solely and proximately by the negligence and carelessness of the plaintiff in the following particulars: In failing to keep a proper lookout while backing her automobile; in failing to give any notice whatsoever of her sudden approach in backing her automobile; and in failing to yield the right-of-way to the defendants' automobile which had entered the driving portion of the parking place prior to the approach of the plaintiff's automobile which was backing up. The defendants' answer specifically denied that the injuries alleged in the plaintiff's amended petition were caused or came about in any manner whatsoever as a result of the collision referred to in the plaintiff's amended petition.

The plaintiff's reply to the defendants' answer denied every material allegation contained therein.

For convenience we will refer to Mary B. Crawford as the defendant, and to Frances J. Herndon as the plaintiff.

The defendant was called as a witness for the plaintiff and testified that at the time of the accident she owned a 1957 DeSoto automobile which was used for family purposes; and that on the day of the accident July 17, 1959, she had been shopping at the Countryside Village Shopping Center and parked in front of the Broadmoor Grocery Store, facing south. The plaintiff parked in front of the hardware store which was directly opposite the grocery store. The accident happened about 5:30 or 6 p.m. The defendant further testified that she started her automobile, released the brake, pushed the reverse button, applied the accelerator a little bit, and then felt a bump; that she did not recall looking to the rear or seeing the automobile behind her; and

that when she became aware of the fact that she had struck another automobile which was facing north in front of the hardware store on the opposite side from defendant's automobile and parked in a normal position, she got out of her automobile and noticed a dent in the trunk of the Herndon automobile. The defendant gave her name and address to the plaintiff and told the plaintiff she would contact her husband and let him take care of the matter. The defendant also obtained the plaintiff's name and address. The defendant further testified that she did not see the Herndon automobile moving or anything like that prior to the time she collided with it.

The plaintiff testified that on the day of the accident she had occasion to be out at a restaurant where her husband was working as a chef at Ninetieth and Center Streets in Omaha; that she was asked to go to the Countryside Village area to obtain a quart measure which her husband needed; and that she parked in front of a hardware store and was sitting on the right side of the automobile which a Mr. Qualls had driven for her. She further testified that Qualls went into the hardware store to pick up the measuring cup and he was going to drive the automobile back to the restaurant; and that all of a sudden the back end of the automobile in which she was sitting was hit. The plaintiff was thrown backward then forward, and her right knee hit against the glove compartment. The plaintiff then turned around and saw the automobile behind her. She got out of her automobile to find out what had happened, and asked the defendant if she would get out of her automobile and see what had happened to the automobile in which the plaintiff had been sitting. The defendant told the plaintiff she would give plaintiff her name and address and things would be taken care of. The plaintiff and defendant exchanged names and addresses. At the time this conversation was going on, Qualls was coming from the hardware store to the automobile. The plain-

tiff further testified that she was shaken up; that she got back into the automobile and Qualls drove her back to the Center Cafe; that the longer she sat in the automobile the more her right leg and knee hurt; and that when she got out of the automobile and put her weight on the leg she knew there was something wrong with her knee. The plaintiff further testified that she thought her knee was just bruised and did not want to run off to the doctor. She thought she would wait a few days and see if the trouble would go away, but it did not. She waited a week to ascertain if the trouble would wear off. She had an appointment with her regular doctor on the 24th, and wanted to see him about other things, but did discuss with him the trouble with her knee and told him about the accident. She also went to a Dr. Tribulato, a general practitioner, and ultimately went to an orthopedic surgeon, Dr. Bach, in October. Prior to going to Dr. Bach, she treated her knee with hot packs. Dr. Bach examined her knee and put her to bed in the hospital. He put a plaster cast on her leg. After 8 weeks, a half cast was put on her right leg. She was in a wheelchair around home after she left the hospital, and was unable to do any housework, and was not employed. She needed assistance to get up and down. After the cast was taken off, she used crutches until just before Christmas. The first time she was able to get up and around without the use of crutches was in the spring of 1960. The plaintiff further testified that after her treatment by Dr. Bach and the removal of the cast, the condition of her knee was somewhat better; that she was required to wear an elastic bandage on the knee because if she stood too long she got tired, and the support helped; that with such aid she was able to work practically every day; and that on October 10, 1959, she had a bandage on her knee and stooped over to put a potato sack in the sink when she experienced a quick, sharp pain and had to support herself and had a hard time getting her leg

straightened out. The plaintiff further testified that at the time of the accident she was working for the Armstrong Cleaners as a lister and checker for intake and outtake of clothes and storage; and that she had worked for about 3 months for a salary of $1 an hour, and averaged 8 hours a day, some days 9 hours, and on Saturdays between 4 and 5 hours. She also testified that she was unable to work until January 1, 1961.

On cross-examination the plaintiff testified that from the date of the accident, July 17, 1959, she continued to work at the Armstrong Cleaners until September 1959; and that she did not mention to the defendant that she received any injury at the time of the accident because she did not feel it at the time, she was just shaken up.

Dr. Bach, on October 19, 1959, examined plaintiff's right knee and found pain and tenderness about the inner side of the right knee particularly, and local swelling. This witness thought the plaintiff had an internal derangement of the knee and probably or possibly a torn medial semilunar cartilage. The plaintiff was put in traction for a few days and then a cast was applied from the ankle joint to the hip. On November 20th, the doctor took part of the cast off and used the remaining half of the cast as a splint for a little while. The plaintiff wore the half cast for approximately 10 days. The doctor further testified that he saw the plaintiff on November 30, 1959, and on January 9, 1960, and she seemed better. In answer to a hypothetical question, the doctor gave his opinion with reasonable medical certainty as to the causative connection between the original injury of July 17, 1959, and the pain which the plaintiff experienced from that date on, as follows: "In view of the fact that the question states that the patient had no pain prior to the incident and had continued discomfort afterwards I would say that there is a causative connection." The doctor's diagnosis was that the plaintiff suffered a sprained medial lateral liga-

ment, and had osteoarthritis of both knees. He further testified that he had no record of the plaintiff having any difficulty following an automobile accident. The doctor further testified that the plaintiff had a little flareup of pain in her knee on January 9, 1960, when he saw her. He sent her to a physical therapist for treatment and gave her some medication. The doctor's bill was $55.

Dr. Bach was not asked his opinion as to whether or not the plaintiff would have any permanent or future pain and suffering as a result of the alleged injury. The only evidence presented of continual pain from the date of the accident up to the time that Dr. Bach examined the plaintiff is the evidence of the plaintiff herself.

Gloria Ann Nordbye testified that she is a sister of the plaintiff; that on either July 20 or 21, 1959, there was a birthday party for the plaintiff's son Jackie at the plaintiff's residence between 6 and 7 p.m.; that she was present at the party for 2 or 3 hours; that during the party this witness did not hear the plaintiff complain about being hurt; that the plaintiff carried on like any mother would in giving a birthday party; and that the plaintiff was not limping that evening. This witness further testified that about the last part of August or the first part of September there was a gathering at the home of this witness; that they pulled the table back in the diningroom to endeavor to teach Jackie, the plaintiff's son, to dance; and that the plaintiff danced and made no complaint about any pain in her leg or about being hurt in an automobile accident.

Nellie Rowin, another sister of the plaintiff, testified that she was present at Jackie's birthday party the 20th or 21st of July; that she observed the plaintiff and talked to her; that the plaintiff made no complaint about an accident; and that she did not notice the plaintiff limping, nor did the plaintiff complain of pain or discomfort. This witness further testified that she was at a family gathering at Mrs. Nordbye's home some time

after July 17, 1959, and that the plaintiff was there and danced and had a good time.

A Mr. Qualls accompanied the plaintiff to the hardware store. He testified that the plaintiff stayed in the car. He heard a crash while he was inside the store. He looked out the window and saw that a collision had occurred. The plaintiff complained of hurting her knee in the accident.

On cross-examination it developed that this witness had been interviewed by an attorney accompanied by a court reporter on November 17, 1960. He made a statement which was used in cross-examination. His statement disclosed that he was in the right front seat of the automobile and that the plaintiff was in the driver's seat backing her car. He told the plaintiff to look out, and the collision occurred "right away." He was not shaken up or injured by the accident. He further said that the plaintiff was backing out of her parking place at a speed of less than 5 miles an hour. He then changed his testimony to say that the plaintiff was not moving at all. He further said that the plaintiff had backed less than 4 feet at the time of the collision.

It was indicated by the record, without objection, that the plaintiff was in the hospital from October 19, 1959, to October 30, 1959, and that the hospital charge was $319.75.

In rebuttal the plaintiff testified that on July 4, 1959, she and her sisters and their families went to the State Lakes for recreational purposes. Later in the evening they went to Mrs. Nordbye's house and played records, and she danced with her relatives. There is no evidence on the part of the plaintiff of any party being held by her for her son Jackie on July 20 or 21, 1959, as testified to by her sisters. The plaintiff testified that she did no dancing after July 17, 1959. The record discloses that the plaintiff and her sisters had difficulty over family matters.

The defendants argue that the following part of instruction No. 13 is prejudicially erroneous: "You will also consider any loss of wages which may have been lost by the Plaintiff as the result of this injury. You will also take into consideration any pain and suffering, both physical and mental, which you may find Plaintiff endured at and since the time or may endure in the future as the direct and proximate result of the collision.

"There is no rule which the Court can give you to measure the amount of damages from pain and suffering, but you will take into consideration all of the facts and circumstances as shown by the evidence in the trial, and arrive at such an amount as in your judgment will fairly compensate the Plaintiff for the pain and suffering she endured or may endure in the future, and if your verdict be in favor of the Plaintiff you should add this to the total medical bills and loss of wages and arrive at such an amount as in your judgment will fairly compensate Plaintiff for the damage she suffered as a direct and proximate result of the collision."

The following is applicable.

In Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891, it is said: "The future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person." See, also, Hermilla v. Peterson, 171 Neb. 365, 106 N. W. 2d 507.

The evidence is wholly lacking to establish with reasonable certainty that future pain and suffering will be experienced by the plaintiff as a result of the alleged injury inflicted on her by the accident. We find instruction No. 13 to be prejudicially erroneous.

Other matters raised by the defendants need not be discussed.

For the reasons given in this opinion we reverse the judgment and remand the cause for new trial.

REVERSED AND REMANDED.

BLANCHE I. LIGHT ET AL., APPELLANTS, V. ETTA ASH ET AL., APPELLEES.

116 N. W. 2d 90

Filed January 11, 1963. No. 35156.

SUPPLEMENTAL OPINION

Husband and Wife: Witnesses. The holding in Kiser v. Sullivan, 106 Neb. 454, 184 N. W. 93, that in an action by a nonresident married woman against a representative of a deceased person to recover title to lands in this state, her husband is a competent witness to testify to conversations with such deceased person, is overruled.

Appeal from the district court for Custer County: S. S. SIDNER, Judge. On motion for rehearing. See *ante* p. 44, 115 N. W. 2d 903, for original opinion. Motion for rehearing overruled.

Edwin J. Myers, Frank E. Edgerton, and William L. Andrews, for appellants.

Carlos C. Schaper and Beatty, Clarke, Murphy, Morgan, Pederson & Piccolo, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

Appellants contend on rehearing that this court was in error in holding that the evidence of the oral contract is not clear, convincing, and satisfactory. After a review of this evidence, we conclude that our former opinion reported *ante* p. 44, 115 N. W. 2d 903, arrives at the correct conclusion on this point.

Appellants insist, however, that the testimony of Allen Light and Amber Ash was clear, convincing, and satisfactory, and was sufficient to make a prima facie case. We think there is an additional reason why the contention of appellants cannot be accepted.

Allen Light is the husband of Blanche I. Light, the daughter of Etta Ash. Amber Ash is the wife of Boyd

Ash, a son of Etta Ash. Both are nonresidents of Nebraska and were held to be competent witnesses under our holding in Kiser v. Sullivan, 106 Neb. 454, 184 N. W. 93. We think this decision is in error in holding that the spouses of nonresident owners of Nebraska real estate are competent witnesses.

It is provided by section 25-1202, R. R. S. 1943, in part as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, * * *." The only criterion for determining the competency of a witness under this statute is whether or not the witness will benefit from the result of the case in which he seeks to testify. With the exception of Kiser v. Sullivan, *supra,* this court has consistently adhered to this construction of the statute. See, In re Estate of Tilton, 129 Neb. 872, 263 N. W. 217; Craig v. Seebecker, 135 Neb. 221, 280 N. W. 913; Oft v. Ohrt, 128 Neb. 848, 260 N. W. 571. Under these cases, the interest of the witness in the result of the litigation, and not his relationship or status with interested parties, determined the question of the competency of the witness to testify.

In the instant case, a successful result would invest the four children of Etta Ash with her estate, share and share alike. It would likewise invest the spouses of the children with a marital interest. Each child and spouse therefore has a direct legal interest in the result of the litigation as we held in Holladay v. Rich, 93 Neb. 491, 140 N. W. 794.

In Kiser v. Sullivan, *supra,* we created an exception to the general rule that the competency of a witness under section 25-1202, R. R. S. 1943, was based solely on his interest in the result of the litigation. In Kiser v. Sullivan, *supra,* we determined that because a nonresident owner of Nebraska real estate could bar the marital interest in his spouse without her joining in the

conveyance, as provided by section 30-105, R. R. S. 1943, that the spouse was competent to testify irrespective of section 25-1202, R. R. S. 1943.

The spouse of a nonresident owner of Nebraska land has the same marital interest in it as does the spouse of a resident owner. The fact that the marital interest of a nonresident spouse may be barred by a different form of conveyance than that of a resident spouse does not defeat the marital rights of the nonresident spouse when no such conveyance was made. The assumption in Kiser v. Sullivan, *supra,* that a nonresident spouse had no marital interest in Nebraska real estate because the title-owning spouse could bar it without a joinder of his spouse in the conveyance, is fallacious. We think that the marital interest of the spouse of a nonresident owner of Nebraska real estate is identical with that of the resident owner and that such nonresident spouse is an incompetent witness to the same extent and under the same conditions as a resident spouse. We, therefore, overrule Kiser v. Sullivan, *supra,* as it relates to the competency of spouses of nonresident owners of Nebraska real estate to testify irrespective of section 25-1202, R. R. S. 1943.

Having arrived at this conclusion, Allen Light and Amber Ash were incompetent witnesses, they having a direct legal interest in the result of the litigation within the purview of section 25-1202, R. R. S. 1943. The incompetency of these two witnesses leaves the appellants without competent evidence to support the allegations of their petition. For the reasons stated in this supplemental opinion, in addition to those stated in our previous opinion, the motion for a rehearing is overruled.

MOTION FOR REHEARING OVERRULED.

SPENCER, J., dissenting.

I respectfully dissent from that part of the supplemental opinion which overrules Kiser v. Sullivan, 106 Neb. 454, 184 N. W. 93. In my judgment it has ignored

the development of our law starting in 1879 with interpretation of the Code of Civil Procedure of 1866 and continuing with the adoption of the present act in 1883.

Section 25-1202, R. R. S. 1943, was enacted in 1883 and has never been changed. Previous to that time there was a more restrictive statute which read: "* * * nor shall any person, having a direct legal interest in the result of any civil cause or proceeding, be a competent witness therein, when the adverse party is an executor, administrator or legal representative of a deceased person." G. S. 1873, § 329, p. 582. Under this statute in 1879 we held in Gillette v. Morrison, 9 Neb. 395, 2 N. W. 853, that a husband had no direct legal interest in the separate property of his wife and was a competent witness against the representative of a deceased person.

At common law, any interest rendered a witness incompetent and such interest was not necessarily a direct or legal interest. We said in Wylie v. Charlton, 43 Neb. 840, 62 N. W. 220: "Many years ago it became apparent that the common law rule rendering incompetent as witnesses all persons interested in the result of an action was impolitic, and not adapted to the institutions of modern civilization. The injustice done by excluding such witnesses was manifestly a greater evil than that resulting from admitting their testimony and thus affording a temptation to perjury. The legislatures then began to make inroads upon the rule until the broad step was taken which has been embodied in our Code of Civil Procedure, of enacting that every human being shall be a competent witness in all cases, except under certain contingencies expressly provided for. (Code of Civil Procedure, sec. 328.) In these progressive steps of legislation a great variety of statutes appeared, at first extending the competency of witnesses, and then, in connection with such broad provisions as are found in section 328 of our Code, limiting their competency in certain cases."

In Wylie v. Charlton, *supra,* the court held that a resident wife was an incompetent witness because if her husband succeeded, she immediately acquired an inchoate estate of dower which no act of her husband could defeat. As suggested above in Gillette v. Morrison, *supra,* a husband was held to have no direct legal interest in his wife's action. It is interesting to note that a nonresident wife was not entitled to dower in property aliened by the husband. Atkins v. Atkins, 18 Neb. 474, 25 N. W. 724. In Wylie v. Charlton, *supra,* the husband was permitted to testify in his wife's action against the personal representative of a deceased to establish a contract to convey although the wife was not permitted to testify in his separate action.

The distinction is made in the 1905 case of Hiskett v. Bozarth, 75 Neb. 70, 105 N. W. 990, as follows: "It has been held that, in an action by the husband against the representatives of a deceased person to enforce the performance of a contract with the deceased, the wife is an incompetent witness. Wylie v. Charlton, 43 Neb. 840, 851. It was there held that as an aid in the construction of our statute the common law tests applied, and, applying the test, it was demonstrated that the statutory right of dower of the wife, when once attached, remained a charge and incumbrance upon the real estate of the husband, unless released by the voluntary act of the wife or extinguished by operation of law, and that the statutory inhibition rendered the wife incompetent as a witness in behalf of her husband in that and similar cases, because of her direct legal interest in the result of the suit." It was also said in that case: " 'While it seems clear that the term "interest" was used in our statute in the common law sense, *it is equally clear that by restricting the disqualification to those having a direct legal interest in the action the legislature intended to admit the testimony of some persons having interests not direct* or not legal which at

common law would have excluded them.' (Italics supplied.)

"The right by curtesy is distinguishable from the right by dower in this: that it may be defeated by the deed of the wife and without the consent of the husband. Under the common law rule an heir apparent was held to be a competent witness in behalf of his ancestor, because his interest in the estate was liable to be defeated without his consent and by the act of his ancestor, and his interest was, therefore, too remote to disqualify him as a witness. Applying that test to the question under consideration, it seems evident that the interest of the husband in the result of the controversy is so remote, for the reasons stated, that he was not disqualified and his evidence was properly received."

This was the situation in Nebraska until 1907 when dower and curtesy were abolished by section 4 of chapter 49, Laws of Nebraska, 1907. It should be particularly noted, however, that the very next section of chapter 49, section 5, is our present section 30-105, R. R. S. 1943, which has remained unchanged since that time. Chapter 49 was a new law on "Succession Estates of Decedents" which made sweeping changes in our law of succession, and section 5 gave to resident husbands an interest in the wife's real estate which she could not defeat, so that both resident husbands and wives were then put on an equal basis. However, it left nonresidents, both husbands and wives, in exactly the same situation they were in previous to 1907, in that a conveyance by the owner would bar the interest of the nonresident spouse.

The next case after Hiskett v. Bozarth, *supra,* and the 1907 act, to reach this court was the 1913 case of Holladay v. Rich, 93 Neb. 491, 140 N. W. 794. This case presented substantially the same issue involved in Hiskett v. Bozarth, *supra,* the competency of the husband to testify in his wife's action against the representative of a deceased person. Now, however, the resident

husband was held disqualified because the law had been changed to give him an interest in the real estate of his wife which could not be defeated by any act of the wife. The resident husband, therefore, now had a direct legal interest.

The next case in the series is the 1921 case of Kiser v. Sullivan, *supra,* which the supplemental opinion overrules. This case involved the testimony of the spouse of a nonresident owner and merely stated the law as it had existed for more than 50 years. In that case we said: "Under the provisions of section 1269, Rev. St. 1913 (section 5 of chapter 49, Laws of Nebraska, 1907, and the present section 30-105, R. R. S. 1943), if a married woman owning lands in the state of Nebraska is a nonresident thereof, she may convey the same by her deed, without her husband joining in such conveyance. Under this statute, while plaintiff and her husband were residents of another state, she could, without the consent of her husband, and without his joining in the deed, sell and convey any lands that she might own in Nebraska. Had she succeeded in this action, he would have had no interest in the lands that he could sell and convey. He would have no other than an indirect interest in the success of his wife, and the possibility of inheriting from her in the event she should predecease him while owning lands in this state. The possibility of inheriting is not a direct legal interest, and would not disqualify the witness. Rine v. Rine, 100 Neb. 225. It follows that, as he had no direct legal interest in the result of the suit, he was not disqualified by the statute from testifying, and his evidence should have been considered in deciding the case. His testimony is in the record, and, as this is a trial de novo, it will be considered. We are not unmindful that this court has held, in Holladay v. Rich, 93 Neb. 491: 'In an action by a married woman for specific performance of a contract to convey real estate, her husband has a direct legal interest in the result, within the meaning of section 329 of the Code

(Rev. St. 1913, sec. 7894).' From a reading of the opinion, however, it is clear that the learned justice was then speaking of a situation where the parties were residents of this state; and under the decedent law in this state, where the husband and wife are residents of the state, neither could convey his or her lands without the consent of the other, and the husband would have a direct legal interest in any lands of which the wife was seized during coverture; and, of course, as applying to a situation where husband and wife were residents of Nebraska, and the adverse party was the representative of a deceased person, the husband would not be a competent witness for the wife as to any conversation had with the representative's decedent."

The supplemental opinion is premised upon the theory that the "marital interest" of the spouse of a nonresident owner of Nebraska real estate is identical with that of a resident owner, the only difference being in the method of conveyance. The distinction lies in the fact that the nonresident spouse has nothing to convey, but a resident spouse must join in the conveyance of the resident owner or the interest is not barred.

The supplemental opinion further states that Kiser v. Sullivan, *supra,* created an exception to the rule that the competency of a witness under section 25-1202, R. R. S. 1943, is to be determined by the interest of the witness in the result of the litigation. Kiser v. Sullivan, *supra,* instead of creating an exception, merely recognized a rule that had been announced in the earlier decisions of this court. It had been determined in these cases that where the inchoate interest of the spouse might be defeated by the conveyance of the owner alone, the inchoate interest of the spouse was not such a "direct legal interest" as to disqualify the spouse from testifying. By overruling Kiser v. Sullivan, *supra,* the supplemental opinion arrives at a construction of the statute which is more restrictive than the rule which preceded the statute. All this we do in an attempt to

bring "uniformity" between residents and nonresidents where uniformity has never existed.

The inchoate interest of the nonresident spouse is more analogous to that of a child of the owner because the nonresident spouse will only have an interest if the owner is still seized of the property at his death. The resident spouse, however, from the date the property is acquired has an interest which cannot be defeated unless she or he actually joins in the conveyance of the land.

The rule stated in Kiser v. Sullivan, *supra,* is not peculiar to Nebraska. The rule is stated in a well-recognized text as follows: "Whether a husband is competent to testify in an action by the wife for the recovery of real estate depends upon the nature of the estate which he will acquire if the wife is successful. Under a statute giving the husband no use or other rights in the lands of his wife, and empowering her to dispose of her lands by last will so as to prevent descent to him at her death, he has no such interest as will render him incompetent as a witness. Such expectation as he may have upon the death of his wife without having disposed of her lands does not make him incompetent. But if the husband acquires a present interest in the property *which prevnts the wife from making a conveyance of any part thereof except with his consent,* such spouse is interested in the result of the case, and therefore incompetent." (Italics supplied.) 58 Am. Jur., Witnesses, § 320, p. 196. See, also, Annotation, 27 A. L. R. 2d p. 555.

Judge Boslaugh authorizes me to state that he concurs in this dissent.

CARTER, J., concurring.

I am in accord with the majority opinion in this case. The treatment of the controlling point by the dissent is, however, subject to challenge.

I quite agree that chapter 49, Laws 1907, now sections 30-101 to 30-108, R. R. S. 1943, was a new law that made sweeping changes in the law of descent in this state. It has made cases decided prior to its enactment in-

applicable as to the competency of witnesses under the dead man's statute, section 25-1202, R. R. S. 1943. I submit that the following sentence in the dissent is not a correct statement of the law: "However, it left nonresidents, both husbands and wives, in exactly the same situation they were in previous to 1907."

Section 30-101, R. R. S. 1943, provides in part: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seized of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband and wife while residents of this state, or by the deceased while the husband or wife was a nonresident of this state, which has not been sold under execution or judicial sale * * * shall descend * * * in the manner following: * * *." Reduced to a simple statement the statute says when any person shall die leaving a husband or wife surviving who has not conveyed his estate by the method prescribed, the estate shall descend in the manner therein provided. The statute does not differentiate between residents and nonresidents except as to the method of conveyance of the spouse's interest. Where no conveyance has been made, as here, the spouse of the nonresident title owner has an identical marital interest in his estate in this state, as does the spouse of a resident title owner. The words "When any person shall die" make it clear that residence or nonresidence of the spouse is not a material factor in determining the interest of a spouse under the statute. The interests of resident and nonresident spouses are identical and consequently the dead man's statute should be identically applied.

It is true, of course, that one of the means of deciding whether or not a person has an interest in real estate is to determine if he would be required to join in a conveyance of the property. It is not exclusive, however,

nor is it always a controlling factor. The bare legal title is often in one person while the beneficial interest is in another as in the case of a trustee, executor, or agent with power to convey. In a suit for the benefit of one owning only the equitable title against the representative of a deceased person, the equitable owner would be barred under the dead man's statute even though he would not be required to join in a conveyance of the property.

It is contended in the dissenting opinion that, where the interest of the spouse might be defeated by the conveyance of the owner alone, the spouse has only an interest if the owner is still seized of the property at his death, in other words, her interest is merely speculative. This is just as true as to a resident spouse. If this reasoning is sound, the interests of resident and nonresident spouses are all speculative under the plain language of the act in that the marital interest of each might be defeated by a sale under execution or judicial sale. The possibility of a conveyance by a nonresident husband is no more speculative than the possibility of a sale under execution or judicial sale.

I submit that under section 30-101, R. R. S. 1943, a nonresident spouse of a nonresident title owner of an estate in this state has a marital interest in the estate and the quoted statement to the contrary in the dissenting opinion has no foundation in fact. It would be strange indeed if a witness could be a competent or incompetent witness through the simple expedient of moving his residence across a state line. It is direct legal interest that determines the competency of a witness under the dead man's statute, not where he has his residence.

Judges YEAGER, MESSMORE, and BROWER join in this concurrence.

MERRIL R. RELLER ET AL., APPELLEES, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.
119 N. W. 2d 59

Filed January 11, 1963. No. 35204.

1. **Appeal and Error.** In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged.
2. **Trial.** The court is not required to give a proffered instruction upon a subordinate issue, or which unduly emphasizes a part of the evidence in the case.
3. **Trial: Appeal and Error.** When the court adequately instructs upon an issue presented by the pleadings or evidence it is not error to refuse to give a tendered instruction covering the same subject matter.

Appeal from the district court for Lancaster County: JOHN L. POLK, Judge. Affirmed.

Ralph D. Nelson, Henry L. Holst, and Hal B. Hasselbalch, for appellant.

John McArthur, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This is a condemnation action brought by the City of Lincoln, appellant herein, against the appellees Merril R. Reller and Virginia Reller, husband and wife, to condemn an easement across the premises of the appellees to construct a line of sewer known as the Havelock Interceptor Sewer.

Hereafter the City of Lincoln will be referred to as defendant city, and the Rellers as plaintiffs, as they were designated in the district court.

The condemnation action was originally begun in the county court of Lancaster County where it resulted in an award by the appraisers in favor of the plaintiffs of $1,000. The plaintiffs thereupon appealed to the district court for Lancaster County, Nebraska, where a trial to

a jury resulted in a verdict and judgment in favor of the plaintiffs for $6,500 damages.

A motion for new trial made by the defendant having been overruled, it has brought the case to this court on appeal.

The defendant alleges as error that the court abused its discretion and committed errors of law at the trial which were duly excepted to. The only errors which are assigned with any particularity are that the court erred in refusing to give instructions Nos. 2, 10, and 11, tendered by the defendant.

The errors urged with respect to the instructions will be hereinafter discussed. The defendant does not mention anything which can be inferred as an abuse of discretion by the trial court. In its brief it argues certain rulings in regard to the admission of evidence but because no reference to any particular ruling was made in the assignment of errors in this court or the motion for new trial filed in the district court, such errors, if any, will not be considered by us. "In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged." Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628.

The three tendered instructions have reference to the zoning regulations of the city of Lincoln applicable to plaintiffs' premises and affecting the marketability and the value thereof.

The plaintiffs' premises through which the easement was taken consists in all of 135 acres of contiguous lands with a somewhat irregular boundary located in Section 7, Township 10 North, Range 7 East of the 6th P. M. The centerline of the easement for the interceptor sewer enters the southern boundary of the westerly portion of the plaintiffs' land and runs through it on a straight line diagonally on a course of about 38° north of east, turn-

ing towards straight east a short distance before reaching the eastern boundary thereof.

The easement taken was a permanent easement 15 feet wide in which to place and maintain the sewer, and a temporary easement on a strip of land lying within 60 feet northwesterly and 40 feet southeasterly from the centerline of the permanent easement to be used and occupied during construction of the sanitary interceptor sewer, but not later than April 30, 1962.

There is a trailer park or camp on the plaintiffs' premises. It is a rather extensive development with several buildings in connection therewith, paved streets, and light, sewer, and water connections which the plaintiff Merril R. Reller testified cost $125,000. The major portion of the damages claimed by the plaintiffs was to this trailer court which the interceptor sewer crossed at the northwest corner and for some distance was not far therefrom. Plaintiff Merril R. Reller testified that great piles of earth were allowed to remain on the strip taken for temporary use which had not yet expired at the time of trial. Some of the trailer lots were covered with dirt. The drainage was blocked and parts of the trailer court were flooded. A well was destroyed which could not be relocated close to the sewer. A private sewer serving the trailer court and a commercial area had been interfered with. The whole of the trailer court had been damaged 10 percent. Most of this evidence was admitted without objection.

Most of the 135 acres on the plaintiff's premises aside from the trailer court and a small area along the Cornhusker Highway, being U. S. Highways Nos. 6 and 77, which formed the south boundary of the east 80 rods thereof, was farmland at the time of the taking. Plaintiffs claimed damages because the interceptor sewer cut through the farmland diagonally and Merril R. Reller testified that homes or other buildings could not be built or streets paved on top thereof. He said this land had greater value because of its availability for sub-

dividing. He testified as to neighboring residential and commercial areas and that the land was suitable for subdivision.

The defendant city introduced testimony of values but a considerable portion of its evidence turned on matters connected with the zoning ordinances of the City of Lincoln as affecting the plaintiffs' land and its availability for subdivision, as testified to by Reller. Also it questioned the right of plaintiffs to maintain the trailer court in its present location under the theory that it affected the right to recover damages.

The provisions of the municipal code of the City of Lincoln containing the zoning ordinance as it existed at the time of the taking was placed in evidence by the defendant city, with the plat showing the boundaries of the various districts zoned at that time. The plaintiffs' premises all lying outside of the corporate limits of the City of Lincoln but within 3 miles thereof were zoned thereby under section 15-902, R. R. S. 1943.

Plaintiffs' premises were in two zoning districts. The portion within 200 feet of the Cornhusker Highway is zoned as "H-I" which is a highway business district concerning which there appears no dispute. It is a comparatively small portion of plaintiffs' property. All the remaining premises is zoned in district "AA" rural and public use district. The uses in district "AA" were restricted to farming, truck gardening, and nurseries; public grounds; buildings such as churches, schools, hospitals, etc.; and single family dwellings having an area of not less than 1 acre and with certain yard restrictions.

The trailer court is in district "AA" but such a use is not permitted therein by the provisions of the zoning ordinance in effect at the time of the taking. The section of the zoning ordinance which adopts the map showing the several zoning districts was enacted September 10, 1956, by the city. The section establishing the uses of premises in the "AA" district was adopted

February 20, 1956. Both sections purport to amend pre-existing sections which are not shown in evidence.

The evidence shows plaintiffs purchased their premises before these ordinances were in effect and there is testimony that they began construction of the trailer court beforehand also. It also appears that the trailer court was being improved or extended thereafter and that plaintiffs were seeking to extend it at the time of the taking. Just what was originally built and when certain portions were extended or added cannot be ascertained in many instances because the witnesses only indicated to what they referred by pointing to a plat.

There is a separate section of the municipal code describing the requirements of trailer camps and setting them out in some detail. It provides trailer camps may be authorized by permit from the city council in certain districts but not in "AA" districts. It is the only provision specifically mentioning them. The earliest such section shown in evidence went into effect February 15, 1960. The section amended a prior section not in evidence. What the previous section so amended provided prior to that time is not shown.

The city also introduced evidence that no plat of the trailer court, its lots, and roadways had been approved by the city apparently on the theory that approval of the city was also necessary before lots could be platted or roadways could be established therein. The trailer court was the private property of the owners. The lots were to be rented by the proprietor of the court to trailer owners. It appears no subdivision or dedication of roadways or sale of lots to others was contemplated and the approval of plats under section 15-901, R. R. S. 1943, was not necessary. The plaintiffs were restricted by the zoning ordinance as it existed from platting or planning residential districts having lots less than an acre in area. However, plaintiffs appear to have owned more than 100 acres of farmland, and some residential areas in the outskirts of cities have residential districts

containing lots of that size. Apparently plaintiffs intended to subdivide them into lots of smaller size.

There was evidence introduced by both plaintiffs and defendant as to the possibilities of a change of the zoning but the testimony indicates no request or application for such a change had been made nor was any change under contemplation in the near future.

With this evidence before the court the defendant offered its instructions. Instruction No. 10 so tendered will not be set out here. It consisted of four typewritten pages, setting out verbatim sections 15-901, 15-902, and 15-903, R. R. S. 1943. It was refused and the court ruled rightly in so doing. The statutes copied therein covered various matters, including platting of subdivisions, regulating, zoning, and construction of buildings, and establising zones of trade and industries. Much of the matter was wholly irrelevant and would serve only to confuse the jury. Zoning and platting were but collateral matters going to the extent of the damage and should not be given such emphasis in the instructions. In Dunn v. Omaha & C. B. St. Ry. Co., 139 Neb. 765, 298 N. W. 741, this court stated: "The court is not required to give a proffered instruction upon a subordinate issue, or which unduly emphasizes a part of the evidence in the case."

Instruction No. 2 requested by the defendant city was as follows: "Existing valid zoning ordinances may prescribe or limit those uses which may be considered in proving value. If you find from a preponderance of the evidence that a reasonable probability exists that the ordinance may be changed in the near future, then you should consider evidence of the value of uses prohibited by the present zoning ordinance. On the other hand, if you find from the evidence that no reasonable probability exists that the classification set out in the ordinance could be changed in the immediate future, then you will not consider any evidence that has been offered in determining any enhanced value for the property for the uses that are prohibited by the zoning ordinance."

This instruction deals with the probability of changing the classification in the existing zoning ordinances. There was evidence that the zoning might be changed but other evidence indicated there was no change under consideration in the near future. The court's instruction given on its own motion, which is later set out, sufficiently states the law as tendered by the defendant in its instruction No. 2. There was no error in refusing to give the instruction. The defendant's tendered instruction No. 11 is as follows: "A city is a political subdivision of the state, created as a convenient agency for the exercise of such governmental powers of the state as may be entrusted to it by constitutional provision or legislative act.

"The Legislature may grant to municipal corporations the right to exercise police power beyond and within a prescribed distance of the municipal limits.

"The power granted to a city by state law to exercize (sic) zoning authority outside of the corporate limits is an enactment under the police power of the state. Zoning laws and ordinances incident thereto are generally for the welfare and health of the citizen under the police power of the state."

This instruction likewise could only unduly emphasize the importance of zoning in the controversy and minimize the principal duty of the jury to determine the damages to plaintiffs' lands. It is a statement of law taken from the case of Schlientz v. City of North Platte, 172 Neb. 477, 110 N. W. 2d 58. Though it may be a proper statement of the law it was neither necessary nor proper to give it to the jury. It was not necessary that it be informed of the power of the Legislature to grant nor the source of the city's power to exercise its zoning authority or that zoning ordinances were generally for the welfare and health of the citizens in this particular case. The refusal to give this instruction particularly in view of those the trial court gave and which we set out herein was not error.

A portion of instruction No. 4 given by the court on its own motion is as follows: "You are further instructed that in determining the fair and reasonable market value of the property in question, you must consider its value for any purpose for which it might reasonably be used, taking into consideration all of the uses and purposes to which it was adapted, as shown by a preponderance of the evidence, and any advantages or disadvantages, if any has been proven, that the property had by virtue of its position and situation, for any of the uses for which it was available. The adaptability for uses which may be considered must be reasonably probable and so reasonably expected in the immediate future as to affect the reasonable market value of the property at the time it was taken.

"The fair and reasonable market value is not what the property is worth soley (sic) for the purpose to which it was devoted by the owner, or its peculiar value to its owner for special reasons, nor for the purpose for which the party taking it proposes to use it, but it is the highest price the property would bring for any and all purposes to which it was devoted or adapted, and for which it is available, which is shown by a preponderance of the evidence."

It sets out the requirement that the uses to be considered must be those so reasonably probable and so reasonably expected in the immediate future as to affect the reasonable market value at the time of the taking or damaging. State v. Mahlock, *ante* p. 190, 116 N. W. 2d 305.

We think this portion of the court's instruction sufficiently sets forth that the jury should consider the use for which the property was available under the zoning ordinance. "Available" as used by the court had reference to the use to which the premises could be put under the zoning ordinance. "When the court adequately instructs upon an issue presented by the pleadings or evidence it is not error to refuse to give a tendered

instruction covering the same subject matter." Svoboda v. DeWald, 165 Neb. 50, 84 N. W. 2d 211.

We find that the substance of the proffered instructions Nos. 2 and 11 were given by the court without the objectionable features mentioned in those tendered.

The errors complained of cannot be sustained and the judgment must be affirmed.

AFFIRMED.

SIMMONS, C. J., not participating.

IN RE APPLICATION OF HAGEN TRUCK LINES, INC. HAGEN TRUCK LINES, INC., APPELLEE, V. ROBERT Y. ROSS, DOING BUSINESS AS ROSS TRANSFER, ET AL., APPELLANTS, IMPLEADED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ET AL., APPELLEES.

119 N. W. 2d 76

Filed January 11, 1963. No. 35281.

1. **Motor Carriers.** In considering an application for a permit to operate as a contract carrier the burden is upon the applicant to show that the proposed service is specialized and fits the need of the proposed contracting shippers.
2. ———. Protesting common carriers may then show that they are fit, willing, and able to meet the special need.
3. ———. If competent proof is made by the applicant showing the proposed service to be specialized and needed, and by protesting common carriers showing a willingness and ability to perform it, the applicant must then establish that he is better equipped and qualified to meet the special needs of the proposed contracting shippers than the protesting common carriers.
4. **Motor Carriers: Public Service Commissions.** Proposed contracting shippers desiring a specialized service are entitled to service in accordance with their needs. Where the evidence is in conflict as between an applicant for a contract-carrier permit and objecting common carriers, it is the province of the Nebraska State Railway Commission to resolve the issue.
5. **Motor Carriers.** The adequacy of existing services to perform the normal needs of proposed contracting shippers is not conclusive where the new service is better designed to fit the

special requirements of the proposed contracting shippers.

6. ———. The purpose of the Nebraska Motor Carrier Act is not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair and destructive competitive practices.

7. ———. The term "consistent with the public interest," contained in section 75-235, R. R. S. 1943, has a different meaning than the term "public convenience and necessity," contained in section 75-228, R. R. S. 1943. "Consistent with the public interest" means that the proposed permit must not conflict with the declared legislative policy of the state in dealing with transportation by motor carrier, and is less exacting than in the proof of public convenience and necessity.

Appeal from the Nebraska State Railway Commission. Affirmed.

Jack Devoe and James E. Ryan, for appellants.

Nelson, Harding & Acklie, for appellee Hagen Truck Lines, Inc.

David D. Weinberg and Max A. Powell, for appellees International Brotherhood of Teamsters etc., et al.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an appeal from an order of the Nebraska State Railway Commission authorizing Hagen Truck Lines, Inc., to engage in operations as a contract carrier by motor vehicle to transport meat, meat products and by-products, dairy products, articles distributed by meat packing houses, and such commodities as are used by meat packers in the conduct of their business, except liquid commodities in bulk in tank vehicles, moving in mechanically refrigerated equipment from and to packing plants in Omaha, Fremont, and Scottsbluff, to all points in Nebraska, all such lading to originate or terminate at a meat packing, dairy, or poultry plant.

Many objectors entered their appearances in the numerous hearings held by the commission. An appeal

was taken to this court by Ross Transfer, Valentine Motor Lines, West Nebraska Express, Inc., Red Ball Transfer, Watson Bros. Transportation Co., Inc., and O'Neill Transfer, all of whom are common carriers.

On June 6, 1960, the original application was filed which was designated application No. M-11189. On August 8, 1960, Hagen Truck Lines, Inc., filed an application to extend the authority requested in application No. M-11189, which was designated as application No. M-11205. On December 10, 1961, the two applications were consolidated and the entire record on both applications was consolidated and designated as application No. M-11189. The final order of the commission granting application No. M-11189 was made on the basis of both applications and amendments thereto made in the course of the hearings thereon.

The applicant is a newly formed corporation which had no equipment or employees at the time of the final hearing. The president of the corporation, Fred E. Hagen, is the owner of Hagen Truck Lines and has a partnership interest in Dahl Truck Lines, both of which have their main offices in Sioux City, Iowa. Hagen is the general manager of both of the named truck lines and is shown to have many years experience in truck transportation as a common carrier under certificates issued by state and federal agencies. He testified to assets of approximately $400,000 and liabilities approximating $40,000. He has trucks and trailers available, or the means of obtaining them if the application is granted. He is familiar with the rules and regulations of the commission and indicates a willingness and ability to comply with them. The record sustains the finding of the commission that the applicant is fit, willing, and able properly to perform the service of a contract carrier and to render the service required by those requesting it.

The application was supported by the testimony of official representatives of Armour & Company, Swift & Company, Wilson & Company, and Cudahy Packing

Company, each of whom have meat packing plants in Omaha, and by George A. Hormel & Company, who operates a meat packing plant in Fremont, Nebraska. Swift & Company also operates a packing plant in Scottsbluff, Nebraska. The foregoing companies sell and ship meat and meat products to all points in Nebraska. At the time of the hearing each was using its own equipment in delivering its products to customers. The evidence of each is that it desires to discontinue the maintenance of its own equipment and will do so if adequate similar service can be obtained by an authorized contract carrier.

The evidence shows that the distribution of meat and meat products requires a specialized service. These commodities are perishable. A proper handling requires the use of mechanically refrigerated equipment which will maintain a temperature of 33 to 36 degrees. A failure to maintain an even temperature ordinarily results in a discoloration of fresh meat, referred to in the record as a loss of its bloom, which affects its sale. Rails for hanging fresh meat and floor racks to provide proper circulation for other products are essential to proper handling. The carrying of fresh meat and meat products with so-called dry freight is unsatisfactory because of the danger of contamination and odor transfer. Ordinary common carrier service does not and cannot provide this type of service. Truck-to-store service is desired to eliminate the foregoing risks and satisfy the customers of the shippers. Interlined shipments by common carriers expose these commodities to changing temperatures, contamination possibilities, and a harmful appearance of the package or product. The use of common carriers results in high loss and damage claims. Most shipments are less than truck-load quantities and require a peddle service from the packing plant direct to the customer. The packing companies presently operate their own truck routes in peddle service

into the territories they serve for the number of days each week that the volume of business requires.

The meat packers desire to contract with an authorized contract carrier and eliminate the necessity for maintaining this refrigerated equipment and performing this specialized service. They assert that the plants in Omaha could combine their shipments for outstate customers and furnish loads that would adequately compensate a contract carrier and at the same time eliminate the duplicating routes that each now maintains to serve its customers.

Some of the packing companies have had experience with Hagen at Sioux City, Iowa, where he has operated a peddle service in transporting meats and meat products. They testify through their representatives that the service is satisfactory and that they stand ready to enter into contracts with the applicant for similar service from their Nebraska plants if the application is granted. All testify that there is no common carrier in Nebraska who can furnish the type of service they desire to all points in Nebraska.

Practically all meat and meat products from the packing plants in this state are being delivered by the equipment maintained by each. Occasionally shipments are made by common carrier, particularly where the order arrives after the company truck has left and a common carrier has a scheduled service which can make an immediate delivery. Also in a few cases common carriers have been used to deliver large quantities to a distribution center for handling by company trucks. The evidence is that this use of common carriers would be continued if the application is granted, although some would possibly be discontinued.

The meat packers assert that there is a need for this specialized peddle service, that no common carrier can or will perform it, that applicant is a suitable person to perform it, and that they stand ready to contract with the applicant if the requisite authority is granted.

It is the contention of the protestants that the granting of the application would not be in the public interest. They also assert that where there are a large number of competing common carrier operators, regardless of the number of motor vehicle units being operated by them, a grant of an application by a proposed contract carrier would not be consistent with the public interest as declared in section 75-235, R. R. S. 1943.

The evidence of the objecting common carriers is to the effect that the grant of the application will bring about a reduction in their revenue, that they can provide the same service in the areas where they operate, and that the public interest demands a denial of the application. The evidence shows that the objectors generally did not have the equipment to perform the specialized service sought by the meat packers. Some testified that they would provide the equipment, but their conclusions that they could provide truck-to-door peddle service within the requirements and necessities of the meat packers was lacking in evidentiary support. The evidence of the objectors shows that they handled very little meat and meat products in their common carrier operations. The estimates were that such lading consisted of from 1 to 5 percent of the total business of the shippers. The revenue loss, if any, would be of little import. Even if the application were denied, it does not appear that they would gain additional revenue since the meat packers indicate they would retain their present method of distribution of these commodities rather than use common carrier transportation which they have found in the past to be inadequate.

The issuance of a permit by the commission to an applicant seeking authority as a contract carrier is controlled by section 75-235, R. R. S. 1943. In substance, this section provides that a permit will be granted if the applicant is found to be fit, willing, and able to perform the service in accordance with statutory requirements and the rules and regulations of the com-

mission, and that the operation authorized will be consistent with the public interest. In determining the question of public interest, the commission is required to consider the number of competing operators, and not the number of motor vehicle units being operated by competing operators.

The applicant has the burden of establishing affirmatively the conditions precedent to the grant of a permit as a contract carrier and that the proposed operation is consistent with the public interest and the legislative policy set forth in section 75-222, R. R. S. 1943.

A contract carrier by motor vehicle may be generally defined as one who furnishes transportation service to meet the special needs of the individual shipper or shippers. In other words the commission is required to weigh the special needs of shippers desiring the new contract carrier service against the adequacy of the existing common carrier service. The effect on protesting carriers of a grant of the application and the effect on shippers of a denial are factors to be weighed in determining if the grant of the application would be consistent with the public interest. Interstate Commerce Commission v. J-T Transport Co., Inc., 368 U. S. 81, 82 S. Ct. 204, 7 L. Ed. 2d 147.

Even if existing carriers suffered some loss of revenue by the grant of the application, it is not a conclusive factor although it must be considered. Common carriers are not granted a monopoly in the area covered by their certificates. It is only where a loss of revenue to existing carriers occurs which is not in the public interest that such loss of revenue has a controlling effect. Black Hills Stage Lines, Inc. v. Greyhound Corp., *ante* p. 425, 118 N. W. 2d 498.

The Legislature has provided a factor to be considered by the commission which protestants contend is relevant to the situation before us. The statute states in part: "The commission shall, in the determination of the question of public interest of any proposed opera-

tion, take into consideration the number of competing operators, and not the number of motor vehicle units being operated by such competing operators." § 75-235, R. R. S. 1943.

The evidence indicates that there are a large number of common carriers who would be potential competitors of applicant if the application is granted. While many of them have statewide authority, the evidence is that they do not operate in such a manner as to give peddle service in a truck-to-door operation, carrying only the commodities of the proposed shipping contractors. It would seem that the limitation of the commission's consideration to the number of competing carriers and not the number of motor vehicle units being operated by them is for the purpose of permitting the obtaining of equipment for specialized service after the carriage becomes available. The number of units operated by a common carrier has little relevancy in considering a specialized service such as we have here. It is for this reason, we think, that the number of existing units of common carriers becomes unimportant by statutory pronouncement. The number of competing common carriers who are fit, willing, and able to perform the proposed contract carrier service, even if they do not have the equipment available to perform it but are able to provide it, is a primary consideration.

Section 75-235, R. R. S. 1943, provides that the proposed contract carrier service must be consistent with the public interest. The term "consistent with the public interest" is quite different in its meaning than "public convenience and necessity," as used in section 75-228, R. R. S. 1943. The former requires only that the proposed contract carrier service does not conflict with the legislative policy of the state in dealing with transportation by motor carriers. The latter requires a consideration of the present service rendered in the territory, the need of additional service, and the facilities which the applicant can provide. It will be observed

that to be "consistent with the public interest" is much less exacting in proof of an application for a permit than in the case of establishing "public convenience and necessity." Consistent with public interest simply means that it is not contrary to the public policy of the state, as set out in the Motor Carrier Act.

A contract carrier does not hold its service out to the general public as does a common carrier. The contract carrier serves only certain shippers under specific contracts for its special needs. The shipper is permitted much more control over the operations of the contract carrier than in the case of the common carrier. In the instant case the contract carrier is to perform the service now being handled by the transportation equipment of the shippers supporting the application. There will be little diversion of traffic from existing carriers and little possibility of added revenue to existing carriers if the application is denied.

The evidence in this case supports the following findings: The applicant is fit, willing, and able to perform the proposed service. There is a need for the service, which is specialized, on the part of the supporting shippers. The interested shippers are willing to contract with the applicant for the specialized service if the application is granted. Existing carriers will not be seriously affected by a grant of the application, nor measurably benefited by its denial. A grant of the application would be consistent with the public interest and the legislative policy of the state. Such being true, the commission was acting within its powers in granting the application and its order in so doing is not arbitrary and unreasonable.

AFFIRMED.

SIMMONS, C. J., not participating.

R. B. JONES & SONS, INC., APPELLANT, V. RAY E. NELSON, D/B/A RAY E. NELSON TRANSPORTATION COMPANY, APPELLEE.

119 N. W. 2d 56

Filed January 11, 1963. No. 35285.

1. **Insurance: Pleading.** Where the allegations of a petition, to which a policy of insurance is attached, show that an advance deposit on an insurance policy was paid by the agent upon the promise of the insured to pay it, and that the amount is due and unpaid, the petition states a cause of action.
2. **Pleading: Trial.** Where the allegations of a petition are supported by competent evidence sufficient to make a prima facie case, it is error for the trial court to sustain a motion to dismiss.
3. **Pleading: Judgments.** Where the evidence shows that a person is sued in his personal capacity on an obligation alleged to have been contracted by him, any judgment rendered must run against him personally.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Andrew J. McMullen, for appellant.

Tye, Worlock & Knapp, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an action at law brought by R. B. Jones & Sons, Inc., against Ray E. Nelson, d/b/a Ray E. Nelson Transportation Company, to recover the unpaid amount of an advance premium deposit due on a motor vehicle insurance policy, which was paid by the plaintiff at the request of the defendant. The defendant denied that there was any amount due. A jury was waived and a trial had to the court. At the close of plaintiff's case defendant moved to dismiss the action. The motion was sustained and plaintiff has appealed.

The petition alleges that plaintiff is a licensed agent for Allstate Insurance Company in the State of Missouri. It further alleges that at the request of Ray E. Nelson

it procured a policy of insurance for Ray E. Nelson d/b/a Nelson Transportation Company, effective November 1, 1959. It alleges, also, that the insurance contract required the insured to pay a $2,000 advance premium deposit which was paid by plaintiff to Allstate Insurance Company on the promise of Nelson to reimburse the plaintiff. The petition further alleges a failure on the part of defendant to pay the $2,000. The policy of insurance was canceled as of April 1, 1960. Plaintiff admits a credit of $701.41, and prays for judgment in the amount of $1,298.59 and interest. The policy contract was attached to and made a part of the petition.

The plaintiff called Vivian Moore as its only witness. She is an employee of the plaintiff, holding a position which she described as account executive. She testified as follows: The plaintiff is an insurance agent for Allstate Insurance Company. Sometime prior to November 1, 1959, Ray E. Nelson contacted the plaintiff for the purpose of obtaining a bodily injury and property damage liability insurance policy. Plaintiff procured a policy of insurance from the Allstate Insurance Company, effective November 1, 1959, which was filed with the Interstate Commerce Commission, to meet the requirements of that body as to one holding a certificate as a common carrier. The policy was issued to Ray E. Nelson d/b/a Ray E. Nelson Transportation Company. The numerous attached endorsements were made to Ray E. Nelson Transportation Company.

The policy provides for a premium for the bodily injury and property damage liability based on a fixed charge on each $100 of gross receipts received as a common carrier. The policy also provides for annual minimum premiums totalling $9,000. An endorsement attached to the policy provided that upon delivery of the policy the insured shall pay an advance premium deposit of $2,000 and render a statement of gross receipts within 10 days following the end of each month. The insured was required to forthwith pay the earned

premium on such monthly gross receipts. The policy contract provides: "The deposit premium shall be applied to the last premium installment. If the total earned premium for the policy exceeds the amount of the estimated advance premium or the deposit premium plus the premium earned in the adjustment periods, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured; however, the total earned premium for the adjustment period shall not be less than the minimum premiums stated in the schedule." The evidence shows that insured did not pay the $2,000 to plaintiff but agreed to personally pay $1,000 within 3 months and give plaintiff his note for the remaining $1,000. Insured did not pay the $1,000 or give the note. Plaintiff paid the $2,000 to Allstate Insurance Company. The witness testified that insured paid the monthly premiums due on gross receipts in the total amount of $505.51. She further testified that plaintiff received the sum of $701.41 on a judgment in favor of the insured. These two amounts totalled $1,206.92.

The witness further testified that because of the failure of the insured to make the payments due in accordance with the policy, the policy was canceled on April 1, 1960. In determining the earned premium due, the insured period was found to be 41 percent of 1 year. She further testified that the annual minimum premium was rerated and found to be $6,200 instead of $9,000. The amount claimed to be due on this theory is 41 percent of $6,200, which is $2,542. After crediting the $1,206.92, she testified that the sum of $1,336, actually $1,335.08, is owing. The prayer of the petition is for a judgment for $1,298.59 and interest, which she said is less than the amount actually due.

The petition alleges that plaintiff paid $2,000 to the Allstate Insurance Company at the request of defendant, for which the defendant agreed to reimburse the

plaintiff on the terms hereinbefore stated. The petition prays for judgment for $2,000, less the credit of $701.41, which is $1,298.59. The policy shows that a minimum premium of $9,000 was to be paid. Vivian Moore testified that it has not been paid and that the $2,000 advance premium deposit was chargeable to the minimum annual premium. Neither plaintiff nor defendant, therefore, is entitled to the return of the $2,000 paid to the Allstate Insurance Company. The evidence makes a prima facie case for the amount claimed to be due.

The evidence adduced also tends to support a claim by Allstate Insurance Company for the balance due under the annual minimum premium schedule. This evidence was improperly admitted, because such evidence is a complete departure from the cause of action pleaded in the petition.

The defendant contends that Ray E. Nelson Transportation Company is a corporation and that it was improperly sued as such. The suit is against Ray E. Nelson, d/b/a Ray E. Nelson Transportation Company. In other words, in considering the motion to dismiss, we must treat the action as one against Ray E. Nelson d/b/a Ray E. Nelson Transportation Company. The petition does not indicate that it is an action against a corporation. Any judgment rendered would be against Ray E. Nelson personally and not against the corporation.

We hold therefore that the petition alleges a cause of action against Ray E. Nelson d/b/a Ray E. Nelson Transportation Company and that the evidence is sufficient to sustain a judgment for the amount prayed for. The trial court was in error in sustaining the motion to dismiss.

The judgment is reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

SIMMONS, C. J., not participating.

VENCL SKALAK, APPELLANT, V. COUNTY OF SEWARD, NEBRASKA, ET AL., APPELLEES.
119 N. W. 2d 43

Filed January 11, 1963. No. 35301.

1. **Workmen's Compensation.** The right of either party to a workmen's compensation proceeding to refuse to accept the findings, order, award, or judgment of the judge of the workmen's compensation court who is assigned to hear the same, and to secure in the manner provided by law a rehearing thereof by the compensation court and a determination by a majority of the members thereof, is paramount to and exclusive of the right of appeal to the district court from the original decision.
2. ———. In a workmen's compensation proceeding where it is claimed that accidental injury was sustained, the burden is on the plaintiff to establish by a preponderance of the evidence that a personal injury was sustained by him in an accident which arose out of and in the course of his employment.
3. ———. A workmen's compensation case is considered and determined de novo on the record by the Supreme Court and on that basis the determination is made as to whether or not the plaintiff has sustained the burden imposed.
4. ———. In order to sustain a right of recovery, a plaintiff in a workmen's compensation case on account of an accident must prove by a preponderance of the evidence that he suffered an unexpected or unforeseen event which happened suddenly and violently, with or without human fault, which at the time produced objective symptoms of an injury.

Appeal from the district court for Seward County: H. EMERSON KOKJER, Judge. Affirmed.

Ivan A. Blevens, for appellant.

Baylor, Evnen, Baylor & Urbom, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action by Vencl Skalak, plaintiff and appellant, against the County of Seward, Nebraska, and Hawkeye-Security Insurance Company, a corporation, defendants and appellees, originally instituted in the Nebraska Workmen's Compensation Court to recover

workmen's compensation benefits on account of an alleged accident, claimed to have arisen out of the employment of plaintiff by the defendant county, on or about November 13, 1959. The other defendant is the workmen's compensation insurance carrier of the county and reference to it will not be required further in the consideration of the litigated questions involved herein.

The case was tried in the first instance to a single member of the workmen's compensation court and as a result the plaintiff was denied compensation. Thereafter the plaintiff waived rehearing by the full workmen's compensation court and perfected a pretended appeal directly to the district court. The waiver of rehearing was refused by the defendants and request was made by them for rehearing before the entire workmen's compensation court. Rehearing before the entire court was allowed.

The plaintiff filed a special appearance challenging the right to a hearing before the entire court which was overruled. The plaintiff, for the record, preserved the record of his special appearance. A trial was had to the entire court, and at the conclusion of this hearing relief was denied to the plaintiff. From this judgment the plaintiff appealed to the district court where, in accordance with law, it was tried on the record of evidence taken by the full workmen's compensation court. The question presented by the special appearance was passed upon by the district court unfavorably to the plaintiff, and again a judgment was rendered denying any relief to the plaintiff. Motion for new trial was duly filed and in due course overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

The brief of plaintiff contains two assignments of error. The first is that the court erred in finding that the plaintiff did not sustain the burden of proof, and the second is that the court erred in permitting the defendants to proceed with a rehearing before the compensation

court en banc after the plaintiff had waived rehearing and had docketed an appeal in the district court. The second assignment will be considered first herein.

The theory of this assignment of error is that the defendants, having been the successful parties with nothing from which to appeal, could not prevent a direct appeal to the district court from the one-member adjudication of the workmen's compensation court. This question was directly presented and passed upon adversely to the contention of the plaintiff in the following language in Light v. Nebraska Workmen's Compensation Court, 166 Neb. 540, 89 N. W. 2d 833: "The right of either party to a workmen's compensation proceeding to refuse to accept the findings, order, award, or judgment of the judge of the workmen's compensation court who is assigned to hear the same, and to secure in the manner provided by law a rehearing thereof by such compensation court and a determination by a majority of the members thereof, is paramount to and exclusive of the right of appeal from such original decision."

Nothing has been presented to justify a departure from this pronouncement, therefore it will be said that the assignment of error is without merit.

As to the other assignment of error the burden was upon the plaintiff to establish by a preponderance of the evidence that a personal injury was sustained by him in an accident which arose out of and in the course of his employment by the defendant county. See, Meester v. Schultz, 151 Neb. 614, 38 N. W. 2d 739; Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394; Chism v. Convair Mobile Homes, 173 Neb. 86, 112 N. W. 2d 393.

A workmen's compensation case is considered and determined de novo on the record and on that basis the determination is made as to whether or not the plaintiff has sustained the burden imposed. See, Jones v. Yankee Hill Brick Manuf. Co., *supra;* Feagins v. Carver,

162 Neb. 116, 75 N. W. 2d 379; Dworak v. City of Omaha, 172 Neb. 209, 109 N. W. 2d 160.

In his original petition filed in the workmen's compensation court plaintiff alleged that he was the victim of an accident occurring on November 13, 1959. The accident charged is that he was operating a maintainer for the purpose of removing ruts from county roads in temperatures which at the time were below zero, and that while he was doing this, due to the jarring and shaking of the maintainer, the heater in the maintainer was broken and on that account failed to operate, by reason of which he was subjected to exposure to cold greater than that of the general public in the same locality, and which became a hazard over that of others in the locality.

The accidental injury is alleged as follows: "That as a direct and proximate result of the freezing of the plaintiff's foot and leg, he suffered complications of a deep seated osteomyelitis of the phlanx (sic) of the third and fourth toes on his left foot, requiring surgical removal of the distal end of the phlanx (sic) bone on the third toe."

This pleading and the evidence throughout the record point to a named antecedent and existing condition or disease which, coupled with the accident and the described alleged weather conditions, caused the plaintiff's claimed accident. This condition or disease was osteomyelitis. A definition or description of it is not found in the evidence of the medical and surgical witnesses or elsewhere in the record.

In this light it does not appear improper to set forth here the analytical definition of the disease and the area of involvement in the event of its existence. In Dorland's Illustrated Medical Dictionary, 23rd edition, osteomyelitis and other related terms are defined as follows:

Osteomyelitis: "Inflammation of bone caused by a pyogenic organism. It may remain localized or it may

spread through the bone to involve the marrow, cortex, cancellous tissue and periosteum."

Pyogenic: "Producing pus."

Cancellous: "Of a reticular, spongy, or lattice-like structure: used mainly of bony tissue."

Cortex: "The outer layer of an organ as distinguished from its inner substance."

Periosteum: "The tough fibrous membrane surrounding a bone. It adheres to the surface of the bones, excepting at their cartilaginous extremities. It consists of two closely united layers, the outer one made up of connective tissue, with occasionally a few fat cells; the inner one of fine elastic fibers, forming a dense network."

There is no dispute about the fact that the plaintiff was afflicted with osteomyelitis and that it had manifested its existence on occasions over a long period of years. He had a fracture of his left ankle in 1938 and received treatment for osteomyelitis first in 1939. Without going into detail it will be said that the record discloses that intermittently on occasions for long periods of time the plaintiff received medication the purpose of which was to combat the disease. On two occasions amputation of the lower part of the leg was advised. Coming down to the later period the doctor of the plaintiff testified that, in addition to treatment on numerous other dates which will not be mentioned here, he saw and treated plaintiff for this condition on four occasions during July and August 1958, about 14 times in April 1959, eight times in May 1959, and one time in October 1959. This doctor saw him again on December 12, 1959, when for the first time he was told about the alleged freezing of the foot.

No effort was made on the trial to disclose the primary location or locations of the inflammation from which the active condition of which the plaintiff complains flows, if indeed there was any such. The medical evidence indicates that the described conditions were found and treated. The immediate conditions found

were in the toes and areas directly behind the toes. There had been however earlier manifestations of the disease in other areas, and particularly in the heel.

It is made clear that there were external manifestations of the then condition and by X-rays the full local condition was ascertained. These disclosed the existence of osteomyelitis which received treatment by medicines and surgery.

These manifestations become apparent, according to the medical testimony, as the result of sinuses extending outward from the local situs of the inflammation which were avenues for the carriage of pus. Sinus, as the term is used here and by the medical witnesses in their testimony, is "a narrow elongated cavity or tract which extends from a focus of suppuration and other inflammatory softening to a free surface and through which pus discharges." See Webster's Third New International Dict., p. 2126.

The plaintiff was not examined or treated for the injuries which he says were the result of what occurred on November 13, 1959, until December 12, 1959.

Up to this point the consideration relates to the situation as it applied to the original petition filed by the plaintiff, the one on which the case appears to have been tried before the single member of the compensation court. On March 20, 1961, plaintiff filed a new petition in which he departed from the allegation that the temperature was below zero on November 13, 1959, and alleged "The day of November 13, 1959, was very cold with temperatures below freezing." In addition he alleged that while out in this low temperature it became necessary to replace a blade on the maintainer which he was using and that the blade dropped on his frostbitten foot wounding and injuring him. This had not been previously pleaded. The results alleged were substantially as in the original petition.

The extent of the burden which rests upon the plaintiff in this case has been stated. Pursuant to that bur-

den he was required to show either that he suffered an unexpected or unforeseen event which happened suddenly and violently, with or without human fault, which at the time produced objective symptoms of an injury, or an occupational disease, or in other words one which was characteristic of and peculiar to the particular trade, occupation, process, or employment in which he was at the time employed and which excluded all ordinary diseases of life to which the general public are exposed. See § 48-151, R. R. S. 1943.

The latter of these requires no consideration here except to say that there is no evidence of the existence of occupational disease within the meaning of the Workmen's Compensation Act. The question here is alone that of whether or not the plaintiff was the victim of an accidental injury as defined by statute.

Bearing on this question the plaintiff gave testimony the effect of which was that about 11 a.m., November 13, 1959, he had his claimed accident and at that time the temperature was about 17°; that it took 1 to 1½ hours to change the maintainer blade; that he dropped the blade on his left or bad foot which had no feeling in it; that the foot swelled; that the fall of the blade produced no bruise or laceration but it did produce discoloration by the next day; that he continued to work at his employment that day and from then on until about January 17, 1960; and that he did not seek medical attention until December 12, 1959. He testified further to the existence of osteomyelitis in 1952 in which year his left ankle was rebroken and that from about that time on to the date of his present alleged accident he had no treatment except for a callous or something from his shoe. His testimony is not definite as to whether or not he ever told anyone in any capacity for the defendants about the claimed falling blade prior to the time the second petition was filed.

This contains a summary of the evidence of the happening of the alleged accident. There is no refutation

of the evidence of the happening and in that it may be assumed that the plaintiff has sustained the burden of proof.

Accepting this assumption it then becomes necessary to determine whether or not under all of the other evidence this amounted to a compensable accident.

In the first place, and about this there is no question, there was never any visible evidence of trauma. The plaintiff himself observed none. The only thing that was observable by the naked eye or by X-ray was osteomyelitis with its current symptoms and results. If this was a compensable accident, proof of that had to be deduced from what could be seen at the time, the earlier history as disclosed by the evidence, and the sequence of subsequent events and conditions.

There is evidence from which it could be said that the plaintiff was a long-time sufferer from osteomyelitis which had serious and observable manifestations with considerable frequency at least from 1952 up to the end of October 1959, and with some frequency before 1952 following an accident which occurred in 1938.

To sustain his action the plaintiff called two physicians. One of these testified in pertinent part that he first saw and examined plaintiff in September 1960, and found the osteomyelitis with the history of a "thermo-injury" that occurred in 1959. Surgery was performed in September 1960. It does not appear that he received any history back of 1959 except as to a fracture in 1938. On the findings and the limited history he stated in substance that from what he found from his examinaion the accident might well have been and probably was an aggravating factor in causing the onset of osteomyelitis after November 13, 1959. His opinion did not go beyond this.

The other physician called testified, likewise in pertinent part, that he first saw the plaintiff professionally in 1938 and on numerous occasions thereafter including December 12, 1959, when he saw him regarding the con-

dition which is the subject of this action. At that time he was told of the alleged freezing of the foot but not of any kind or character of trauma. He testified that the plaintiff suffered from osteomyelitis for 3 or 4 years after 1938, and that this was a chronic infectious condition which broke out in different places up to and including 1958 and 1959 prior to November 13. He gave no fixed opinion as to a specific cause of what was found on December 12, 1959.

Two doctors testified by deposition. Neither of them gave any fixed opinion as to cause.

Three other physicians testified and these recited a lengthy history to which no objection was interposed and which met with no denial or contradiction. This history extended from 1938 to 1961. It covered in considerable detail the osteomyelitic condition with repeated outbreaks over the years. None of them gave it as his opinion that what the plaintiff said happened on November 13, 1959, caused the condition which followed that date.

One of them substantially said that ordinary activity, freezing, or trauma could activate the disease of osteomyelitis, but that in the light of the activities of the plaintiff after November 13, 1959, he did not think that what happened on that date was the cause of the condition.

Another said that ordinary activity, freezing, or trauma could activate osteomyelitis.

The third said that freezing could have been a cause, but not frostbite, and also that trauma was a possible cause, but in the light of what was disclosed, the delay in treatment, and continuance at work these were not causes.

In the light of this it becomes clear that there was testimony coming from the plaintiff that he suffered an unexpected and unforeseen event which happened suddenly and violently. There was circumstantial evidence to the contrary. The burden of proof in this respect was

on the plaintiff. If it be assumed that in this respect he has sustained his burden, he still had another burden which was to adduce evidence which by a preponderance showed that the accident at the time produced objective symptoms of an injury.

The plaintiff described no objective symptom or symptoms. No one else testified to the existence of objective symptoms at the time, and none were inferable or deducible from the evidence of the physicians who examined and treated him. The district court therefore did not err in its conclusion that the plaintiff failed to sustain the burden of proving his claim that he suffered an accidental injury within the meaning of the Workmen's Compensation Act.

The judgment of the district court is therefore affirmed.

AFFIRMED.

SIMMONS, C. J., not participating.

IN RE APPEAL OF FRANCIS R. ORSHEK COMPANY, A CORPORATION.

FRANCIS R. ORSHEK COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLANTS AND CROSS-APPELLEES.

119 N. W. 2d 48

Filed January 11, 1963. No. 35308.

1. **Contracts.** The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles.
2. ———. In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification.
3. ———. Where the contract is plain and unambiguous in its meaning the contract will be enforced according to its terms.
4. **Motor Carriers.** The term "common carrier" means any person who or which undertakes to transport passengers or property for the general public in intrastate commerce by motor

vehicle for hire, whether over regular or irregular routes, upon the highways of this state.

Appeal from the district court for Lancaster County: JOHN L. POLK, Judge. Affirmed in part, and in part reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellants.

Sidner, Lee, Gunderson & Svoboda, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The Francis R. Orshek Company, a corporation, filed a claim with the Department of Roads of the State of Nebraska dated November 15, 1960. This claim was disallowed by the Auditor of Public Accounts and the Secretary of State of the State of Nebraska on November 28, 1960. Thereafter the Francis R. Orshek Company prosecuted an appeal to the district court for Lancaster County, as the plaintiff and appellant, and the State of Nebraska, Department of Roads, and public officials involved as defendants and appellees. By agreement of the parties a jury was waived and the cause submitted to the court.

The cause was submitted to the trial court on three specific items: A balance of $3,855.63 admittedly due from the State, but which was being wrongfully withheld because the plaintiff would not execute a release in full; a delay penalty of $2,850 which the State had assessed against the plaintiff; and the sum of $6,843.01 claimed due by the plaintiff, being increased costs arising out of an increase in common carrier rates.

The trial court rendered judgment in favor of the plaintiff and against the State of Nebraska in the sum of $3,855.63 and the sum of $6,843.01 for a total of $10,698.64, together with interest at 6 percent per annum from November 30, 1960, and the remainder of

plaintiff's claim on appeal was denied. Costs were taxed against the State of Nebraska.

The State of Nebraska filed a motion for new trial. The plaintiff also filed a motion for new trial with reference to that part of the judgment which applies to the ruling of the court denying the claim of the plaintiff for $2,850, being the amount of delay penalty withheld by the State, for the reason that the judgment of the court insofar as it applied to the above amount withheld by the State as a penalty for delay was contrary to the law and to the evidence.

The trial court overruled the motion for new trial filed on behalf of the State of Nebraska and also the motion for new trial filed on behalf of the plaintiff. The defendants perfected appeal to this court.

For convenience we will refer to the Francis R. Orshek Company as the plaintiff and to the State of Nebraska, Department of Roads, as the defendant.

The defendant assigned as error that the decision of the trial court is contrary to the evidence and contrary to law.

George Iverson, field superintendent for the plaintiff, testified that he was involved with state project DS-47(10) and was in charge of the work, did the estimating on the job, and supervised the work throughout its construction; that he helped prepare the bids and was present when the bid was submitted; and that he was familiar with all the phases of the work. He further testified that this project consisted of culverts, grading, and paving; that group No. 3 of the contract consisted of paving and miscellaneous work that goes with the paving; that group No. 4 pertained only to culverts; and that the plaintiff bid on groups Nos. 1 and 3, the grading and paving. The contract was based upon certain specifications as to the date of starting and the date of completion. He further testified that the letting was on June 19, 1958, and the completion date was August 15, 1959.

The plaintiff received word from the defendant with reference to a delay in awarding the contract. This was contained in a letter dated July 2, 1958, directed to the plaintiff, and notified the plaintiff that it was the low bidder for grading and paving on project DS-47(10), in the amount of $567,327.80; that delays had occurred in obtaining the right-of-way; and that the purpose of the letter was to request an extension. The letter cited article 3.02 of the 1955 Standard Specifications for Highway Construction, State of Nebraska, hereafter referred to as the specifications, to the effect that the award shall be made within 30 days after the opening of proposals, and requested that this provision be waived. The plaintiff concurred in the waiver. The plaintiff was notified on July 24, 1958, that its bid had been accepted, and the contract was signed on July 29, 1958.

This witness further testified that the first portion of this project would be the culverts, followed by the grading, and then followed by the paving; that the plaintiff started grading on September 18, 1958; that due to the delay in awarding the contract, the work ran into the fall, to a point that the plaintiff was hindered by cold weather which the plaintiff could not contemplate; that the amount of excavation estimated by the State was 359,200 cubic yards, and the actual excavation was 440,078.3 cubic yards; that the total bid on group No. 1 was $66,647; that the final figure for the work done on group No. 1 was $80,648, which the parties agreed was the proper amount after the work was completed; and that the grading overrun had an effect upon the time for completion of the grading operations.

This witness further testified that the Nebraska State Railway Commission increased the tariffs on batch hauls in March 1959; that a batch consists of sand, cement, and gravel which is put into a dump truck at a railroad siding or some other place where these various ingredients are available and the trucker hauls that batch from the railroad siding or loading siding to the place where

the mixer is run and dumps the batch into the mixer; that the rate for batch hauls in effect when the plaintiff bid on the contract and when the contract was let was 37 cents for the first mile and 7 cents for each additional half mile; that the new rate which went into effect in March 1959, was 42 cents for the first mile and 8½ cents for each additional half mile; and that the plaintiff commenced batch hauling on June 23, 1959, after the new rate went into effect.

This witness further testified that he personally made arrangements with the truckers for the transportation of batches, and spent a great deal of time driving around trying to locate truckers; and that he contacted the Nebraska State Railway Commission and was assisted in locating truckers to haul the batches. He obtained a list from the Nebraska State Railway Commission of registered carriers who had certificates of public convenience and necessity over regular and irregular routes. We will hereafter refer to these carriers as RC carriers. He further testified that he personally interviewed and obtained the various truckers.

An exhibit in evidence discloses the amounts paid to the truckers, which was computed on the new Nebraska State Railway Commission rates. The total amount paid these truckers over the old rate was $6,843.01. These truckers were used only on the days the plaintiff was engaged in paving, which was approximately 30 days during the course of the contract. Some of these truckers were RC carriers, others did not have a certificate of public convenience and necessity.

The plaintiff drew up a lease to make it possible for some of these truckers who did not have a certificate of public convenience and necessity issued by the Nebraska State Railway Commission to avoid arrest for not having such a certificate. There was no lease agreement with the RC carriers. The plaintiff furnished funds to make sure the gasoline bills were paid and that other bills relating to the business of such truckers

were paid. The plaintiff, on some occasions, paid the drivers of the trucks that were not holders of certificates of public convenience and necessity. The reason for the lease was a matter of protection to the plaintiff from claims for unemployment insurance, employees' wages, truck drivers' wages, gasoline, and fuel bills. The plaintiff had no control over the truckers. They could and did haul for whomever they desired at any time when they were employed to do so.

On cross-examination of the witness Iverson, article 8.02, subparagraph 11 of the Standard Specifications for 1955, was received in evidence. This subparagraph reads as follows: "The engineer may grant an extension in the working day time allowance or specified completion date when items of extra work not contemplated in the original contract or additional quantities of contract items of work are required. Extensions in time allowances granted for such reasons shall be in proportion to the value of extra and additional work as compared to the total amount of the original contract for the group or groups of work included in the time allowance to be extended. An extension will not be granted for variations in quantities of contract items of work when the net overrun in the value of such variations, computed at contract unit prices, is less than 10 percent of the total amount of the original contract for the group or groups of work included in the time allowances involved."

The witness Iverson testified on cross-examination that the paving operations were started June 23, 1959; and that the grading was ready for the paving operations in the spring of 1959.

The plaintiff received a letter dated April 15, 1959, from Edwin Olmstead, division engineer for the Department of Roads, stating that the soil and climatic conditions were such that the department felt there need be no further delay in the prosecution of the work to be done under the contract, and advising the plaintiff that

the count of working days on the project would be resumed May 1, 1959.

The plaintiff also received a letter dated June 3, 1959, from the Department of Roads which read in part as follows: "Reference is made to the progress of the grading and concrete pavement work included in your contract on Project No. DS-47(10), between Blair and Irvington.

"We would direct your attention to the requirements of the special provisions of this contract with respect to the progress of the work, as follows:

" 'This project is included in the program of projects to be constructed under Section 2(a) of the Federal Aid Highway Act of 1958. It is the intent of the Congress that this program shall provide immediate acceleration of the rate of highway construction.

" 'In furtherance of this intent, the engineer reserves the right to take any measures necessary to insure that all work on this project will be completed on or before the completion date stipulated in the contract.

" 'Paragraph 2 of Article 8.07 in the Standard Specifications is amended to include the following:

" 'If, in the opinion of the engineer, the rate of progress is such that the work will not be completed on or before the specified completion date, the engineer may at the end of the third period or at any time after June 30, 1959, whichever occurs first, after consultation with the contractor and his surety and without giving ten days notice, augment the contractor's forces and equipment as permitted in Paragraphs 2 and 3 of Article 8.09 in the Standard Specifications in order to insure completion of the work by the specified completion date.

" 'Articles 8.02, 8.07 and 8.08 in the Standard Specifications are amended to include the following:

" 'The Department reserves the right to deny any request for an extension in the working day time allowance or of the specified completion date for any reason whatsoever.'

"This contract provides that all work be completed prior to the expiration of a period of 140 consecutive working days, and before August 15, 1959. As of this date, only 9 per cent of the work has been completed, with 44 per cent of the time allowance elapsed. Accordingly, the progress of the work does not conform to the requirements of Article 8.07 of the Specifications, and at the present rate of progress, it appears unlikely that the work can be completed by August 15, 1959, the specified completion date. The only work performed on this project to date consists of rough grading performed by a subcontractor.

"This is to urgently request that you take immediate steps to organize and begin the finish grading and paving work, using sufficient working forces and equipment to complete this work by August 15th."

Another exhibit is a letter from the plaintiff to O. W. Johnson, construction engineer, Department of Roads, dated June 11, 1959, making reference to the fact that the month of May was unseasonably wet, and it was the intention of the plaintiff to be on the project no later than the middle of May; that because of the wet weather and other work, the work on this project was delayed; that the plaintiff was taking steps to start this new work as soon as possible; that the plaintiff was unloading and stockpiling materials at the plant site in Kennard and moving all available equipment from Wymore to Kennard; and that it was the plaintiff's intention to begin the fine grade work some time the next week and would do all in its power to finish the project within the time allowed.

On June 18, 1959, a construction engineer for the Department of Roads wrote a letter to the plaintiff regarding the unsatisfactory progress of the grading and concrete work as provided for by the contract, calling the plaintiff's attention to a letter of June 3, 1959, advising that it appeared unlikely that the work could be completed by August 15, 1959, the specified completion date,

and requesting the plaintiff to take immediate steps to organize and begin to finish the grading and paving work.

The witness Iverson further testified on cross-examination that the plaintiff started to stockpile on June 2, 1959, and began the grading on June 16, 1959; that the plaintiff was charged 17 days overtime from May 1 to June 16, for the reason that the plaintiff did not have the equipment or men on the project work; and that the work was to be done in 140 days, and 150 working days were charged against the plaintiff; and that counting out the 17 days, that would be 133 days that it actually took to complete the work, leaving out the period between May 1 and June 16. This witness further testified with reference to the truckers that the bills of lading consisted of three copies, two of which were carbon copies, prepared by the plaintiff's office manager and furnished by the plaintiff. These bills of lading show the amount received by the truckers, the names of the truckers who did the hauling, and that each trucker received his pay for the work he did and signed a receipt therefor.

On redirect examination this witness testified that at the time the contract was signed, the plaintiff had no way of knowing about the overrun in yardage excavation. If it had, the plaintiff would have requested additional time for completion of the work, and had it not been for the overrun the work would have been completed within the time provided by the contract.

This witness testified on recross-examination that he noticed that under the heading of "Progress of Work" in the special provisions it was stated that this project was included in the program of projects to be constructed under section 2(a) of the Federal Aid Highway Act of 1958, and it was intended by the Congress that this program should provide immediate acceleration of the rate of highway construction; and that he read these special provisions. In other words, he knew it was a speedup program.

This witness further testified that the last paragraph

of this particular subheading "Progress of Work" says: "The Department reserves the right to deny any request for an extension in the working day time allowance or of the specified completion date for any reason whatsoever." This witness was aware of the above provision.

On January 12, 1960, a construction engineer for the Department of Roads wrote a letter to the plaintiff stating: "We are attaching a copy of an extension of contract time allowance and assessment of liquidated damages, which is applicable to the completion of your contract on Project No. DS-47(10).

"The contract time allowance overran 10 working days and 39 working days were charged after the contract completion date.

"Bids were received for this work on June 19, 1958, however, the contract was not awarded until July 24, 1958. Contracts are normally awarded within 10 calendar days of the letting. Accordingly, it is considered that the normal beginning of work was delayed for 25 calendar days by the late award of contract, and to compensate for this delay, we are extending the contract completion date for an additional 25 calendar days to September 9, 1959, without the assessment of liquidated damages.

"The remaining overrun of 19 working days charged after September 9, 1959, is considered to have resulted from your failure to start the paving operations at an earlier date in 1959, and the further unnecessary delay in the shouldering and finishing operations after the concrete pavement work was completed; for which it is necessary to deduct liquidated damages at the rate of $150.00 per working day as stipulated in the special provisions of the contract, the total deduction amounting to $2,850.00."

There is other evidence in the record relating to the number of truckers used on this project by the plaintiff and the number of truckers who held certificates of public convenience and necessity issued by the Nebraska

State Railway Commission. There is also evidence relating to the leases entered into between the plaintiff and certain truckers who did not hold certificates of public convenience and necessity issued by the Nebraska State Railway Commission, to the effect that such leases were a subterfuge and an endeavor to circumvent the regulations of the Nebraska State Railway Commission.

The following are applicable to this appeal.

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. * * * In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification." Smith v. Game, Forestation & Parks Commission, 170 Neb. 593, 103 N. W. 2d 829.

In Adolf v. Union Nat. Life Ins. Co., 170 Neb. 38, 101 N. W. 2d 504, while this action has to do with a contract of insurance, the court set forth the following: "But where the contract is plain and unambiguous in its meaning the contract will be enforced according to its terms. Unless this be the law, the attaching of liability on an insurance company, contrary to the plain meaning of the contract, would be nothing less than a rewriting of the liability provisions of the contract. It appears to us that it would be a dangerous innovation of contract law to hold that one is not bound by what he signs, and that that which he fails to read or understand should be read out of the contract." There are cases to this effect too numerous to cite.

The defendant contends that the truckers used on this project were not common carriers, and consequently the plaintiff is not entitled to recover for the new rate for batch hauls made effective in March 1959 by the Nebraska State Railway Commission for the type of work the truckers were required to do on this project.

The term "common carrier" means any person who or which undertakes to transport passengers or property

for the general public in intrastate commerce by motor vehicle for hire, whether over regular or irregular routes, upon the highways of this state. See, Rodgers v. Nebraska State Railway Commission, 134 Neb. 832, 279 N. W. 800; § 75-223, R. R. S. 1943; Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915.

In Cushing v. White, 101 Wash. 172, 172 P. 229, L. R. A. 1918F 463, the court said: "* * * a common carrier is one whose occupation is the transportation of persons or things from place to place for hire or reward, and who holds himself out to the world as ready and willing to serve the public indifferently in the particular line or department in which he is engaged; the true test being whether the given undertaking is a part of the business engaged in by the carrier which he has held out to the general public as his occupation, rather than the quantity or extent of the business actually transacted, or the number and character of the conveyances used in the employment." The opinion gives an exhaustive review of definitions of the term "common carrier."

We interpret the provisions of the contract relating to the increase in rates for batch truckers to mean that any increase in rates adopted by the Nebraska State Railway Commission for the work being done by truckers on the project such as the one here involved, to be effective in March 1959, involved only such truckers who held certificates of public convenience and necessity issued by the Nebraska State Railway Commission at that time and until such work was completed.

There is no merit to the defendant's contention as to the alleged invalidity of the bills of lading and the receipts given by the truckers to the plaintiff for the pay they received for the work done on this project by them. An examination of the exhibits clearly indicated them to be the type of bill of lading and receipt required,

which the defendant wanted the plaintiff to furnish and which the plaintiff did furnish.

The plaintiff cross-appealed, assigning as error that the district court erred in holding that the defendant could assess a penalty of $2,850 against the plaintiff without showing either its actual damage or that actual damages were impossible of ascertainment, and in holding that under the circumstances the plaintiff should be assessed any damages because of its delay in completion of its contract.

The contract provides: "For each working day that the work contemplated in Groups 1 and 3 shall remain unfinished after the expiration of the time for completing the work, determined as outlined in the Standard Specifications, or after the expiration of such additional time as may be allowed by the engineer, the sum of one hundred fifty dollars ($150.00) per day shall be paid by the contractor."

The contract also provides: "This project is included in the program of projects to be constructed under Section 2(a) of the Federal Aid Highway Act of 1958. It is the intent of the Congress that this program shall provide immediate acceleration of the rate of highway construction.

"In furtherance of this intent, the engineer reserves the right to take any measures necessary to insure that all work on this project will be completed on or before the completion date stipulated in the contract.

"Paragraph 2 of Article 8.07 in the Standard Specifications is amended to include the following:

"If, in the opinion of the engineer, the rate of progress is such that the work will not be completed on or before the specified completion date, the engineer may at the end of the third period or at any time after June 30, 1959, whichever occurs first, after consultation with the contractor and his surety and without giving ten days notice, augment the contractor's forces and equipment as permitted in Paragraphs 2 and 3 of Article 8.09 in

the Standard Specifications in order to insure completion of the work by the specified completion date.

"Articles 8.02, 8.07, and 8.08 in the Standard Specifications are amended to include the following:

"The Department reserves the right to deny any request for an extension in the working day time allowance or of the specified completion date for any reason whatsoever."

By the provisions of the contract, this project being deemed one of expediency to be completed within the time as provided by the contract, it is obvious that by the foregoing provisions thereof and the evidence heretofore set out, the engineer, in granting an extension of working days time allowance for completion of the contract, had a permissive right, or discretionary right only, and the Department of Roads reserved the right to deny any request for an extension in the working days time allowance or the specified completion date for any reason whatsoever. We have detailed the evidence. It discloses that the plaintiff was fully cognizant of and familiar with all of the terms of this contract and the standard specifications relating thereto. We conclude that the trial court did not err in allowing the defendant to assess liquidated damages in the sum of $150 a day for a period of 19 working days by which the plaintiff overran its contract. The plaintiff's cross-appeal cannot be sustained.

With reference to the payments made to the truckers who held certificates of public convenience and necessity issued by the Nebraska State Railway Commission and the hauling done by them for the plaintiff during the course of the contract when the new rate became effective in March 1959, we reverse the judgment and remand the cause to determine the accurate amount due the truckers above mentioned. When this amount is accurately determined there should be added thereto the sum of $3,855.63, and judgment should be rendered by the trial court for the amount thus ascertained, with

interest at the legal rate of 6 percent per annum on such amount from November 30, 1960.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., not participating.

O. K. DOOR COMPANY, INC., A CORPORATION, APPELLEE, V. LINCOLN ENGINEERING CONSTRUCTION COMPANY, A CORPORATION, APPELLEE, THE TRAVELERS INDEMNITY COMPANY, INTERVENER-APPELLANT.
119 N. W. 2d 153

Filed January 25, 1963. No. 35309.

1. **Guaranty.** In an instance where a guarantor who has entered into a contract of guaranty at the request of, or with the consent of, the principal obligor, pays or is compelled to pay his principal's debt, the law raises an implied promise, unless there is an express one, on the part of the principal to reimburse the guarantor, and on payment of the debt the guarantor at once has a right of action against the principal for reimbursement of the amount which he has paid, with interest thereon at the legal rate.
2. **Contracts: Guaranty.** In a case where there is an express written agreement based on a valid consideration declaring the rights of the parties flowing from a breach of the contract the performance of which is guaranteed by a bond, such agreement prevails over the implied right of the guarantor to be reimbursed from funds available under the contract.

Appeal from the district court for Lancaster County: JOHN L. POLK, Judge. Affirmed.

Cline, Williams, Wright, Johnson, Oldfather & Thompson, for intervener-appellant.

Kier, Cobb & Luedtke, for appellee O. K. Door Co., Inc.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This action as instituted was by the O. K. Door Company, Inc., a corporation, plaintiff, against the Lincoln Engineering Construction Company, a corporation, defendant. The petition was filed on February 8, 1960. The action was for the recovery of $2,672 with interest, claimed to be due for certain services performed and material furnished by the plaintiff to the defendant pursuant to contract. On the same day an affidavit for garnishment was filed in which it was declared that the Lincoln Telephone and Telegraph Company, a corporation, was in possession of money due the defendant in the approximate amount of $7,700. The purpose of the affidavit was to cause garnishment process to issue and to have applied sufficient of the money in the hands of the Lincoln Telephone and Telegraph Company to the payment of plaintiff's claim against the defendant.

The Travelers Indemnity Company filed in the action a petition in intervention whereby it claimed priority to all of the funds in the hands of the Lincoln Telephone and Telegraph Company.

For the further purposes of this opinion those who are parties in the action will be referred to in their nominal capacities, and the Lincoln Telephone and Telegraph Company will be referred to as the telephone company.

It is not disputed in the proceeding before this court that the telephone company was indebted to the defendant in substantially the amount claimed for work performed by the defendant, and likewise that the defendant was indebted to the plaintiff in the amount claimed. The pleading of the intervener disputes the claim of the plaintiff but this dispute was eliminated by the theory on which the case was tried. A default judgment was rendered in favor of the plaintiff and against the defendant on April 18, 1960, for $2,851.86 with interest. This obviously included accrued interest on $2,672 to the date of judgment. This judgment was rendered and

the garnishment by the plaintiff was later sustained. The telephone company was ordered to pay to plaintiff $2,672 with interest at the rate of 6 percent per annum from March 4, 1959. The remainder of the amount in the hands of the telephone company was released from the garnishment.

The legal validity of the rights which the plaintiff claimed as against the defendant is not contested herein by either the defendant or the telephone company. The question here is one only of priority of right to funds in the hands of the telephone company. The plaintiff claims priority by virtue of its garnishment, and the intervener claims priority on account of breach of the obligations of a performance bond which it executed and delivered to the telephone company to guarantee performance of a contract between it and the defendant, and on account of an assignment from the defendant to the intervener. The intervener asserted its priority by the petition in intervention which has been mentioned.

The judgment of the plaintiff is of no concern in the matter now before this court except insofar as it relates a valid history of the claim of the plaintiff. The only issue for determination herein is that of which of these two parties has the prior right to money in the hands of the telephone company sufficient to pay the judgment in favor of the plaintiff and against the defendant. The judgment of the district court on this issue was in favor of the plaintiff and against the intervener. From the judgment in favor of the plaintiff and an order overruling a motion for new trial the intervener has appealed.

The brief of the intervener contains several assignments of error but a determination of the question of priority will be dispositive of all of them, therefore they will not be referred to specifically herein.

The pertinent background of the issue to be determined is found in the pleadings, which have relation

to the garnishment and the intervener's claim of priority, and a stipulation of facts, and is as follows:

On or about March 11, 1958, the defendant entered into a contract to construct a telephone exchange at Auburn, Nebraska, for the telephone company. At that time the intervener executed a performance bond in favor of the telephone company in the amount of $58,263, the basic purpose of which bond was to guarantee performance of the contract between the defendant and the telephone company. The plaintiff became a subcontractor and performed service on the building to be constructed by the defendant. The defendant became indebted to the plaintiff on the subcontract in the amount of $2,672. It was for this amount that the default judgment referred to was rendered. The defendant became insolvent and defaulted on the contract with the telephone company some time prior to January 13, 1959, the date on which the intervener took the assignment of money due the defendant from the telephone company on the construction contract in the sum of $7,885.69.

The record does not disclose the date of the contract between the plaintiff and defendant or the date of the completion of performance except to the extent of a recital in the petition that it was entered into in 1958 and that interest was charged on the account from March 3, 1959.

After garnishment by the plaintiff the intervener filed its petition of intervention in which it made the claim that it was entitled to receive from the telephone company all of the money due the defendant under the contract, performance of which was guaranteed by the performance bond, and that this right had priority over the garnishment of the plaintiff. The validity of the garnishment is not a matter of concern. Priority only is involved.

By the petition the intervener claims priority by virtue of the assignment dated January 13, 1959. By its brief the intervener also claims a priority by virtue of

the terms of the performance bond but this claim is not presented by its pleadings or evidence. This is based on a contention that a general or implied agreement flowed from the performance bond which entitled the intervener to priority.

By stipulation of facts it is stated that between the dates of March 2, 1959, and December 1, 1959, the intervener paid obligations of the defendant under the terms of the performance bond mentioned in the amount of $11,676.22.

This amount was paid under the performance bond but for what particular purpose or under what condition or conditions named in the bond is not disclosed. Under the bond the intervener had a choice between two options in case of default by the defendant. One was to complete the contract in accordance with its terms and conditions. The other was to obtain bids for completion under the terms of the contract and to pay therefor, less any balance due on the contract between the telephone company and the defendant. There is no language in the bond stating or the effect of which was to say that this payment amounted specifically to a legal or equitable assignment of money due the defendant from the telephone company. There is nothing in this bond which directly or indirectly exacted payment of anything to the intervener.

If therefore the intervener had any claim it must be found in the assignment which was given to it on January 13, 1959, notice of which, according to the stipulation, was given to the telephone company on or before January 15, 1959, or must flow by operation of law as an equitable right from the guaranty contained in the performance bond, superior to the garnishment of the plaintiff.

By the assignment it is true that the defendant assigned all right, title, and interest in and to any and all money due it from the telephone company under the contract between the telephone company and the de-

fendant, performance of which was guaranteed by the intervener. This assignment however was not without qualification. The fourth paragraph is as follows: "Lincoln Engineering Construction Company hereby authorizes and directs The Travelers Indemnity Company to pay out of said money herein assigned first, any and all lawful claims growing out of the performance of said contract; second, any and all amounts which it may owe The Travelers Indemnity Company; and third, the remainder, if any, shall be returned to Lincoln Engineering Construction Company."

It follows that by this specific declaration of the defendant, accepted by the intervener, since the defendant was indebted to the plaintiff and the telephone company was indebted to the defendant in an amount more than sufficient to pay plaintiff's claim, the plaintiff was entitled to have its claim satisfied out of the money owing to the defendant by the telephone company.

It is true that the intervener, under the guaranty of the performance bond, in the absence of other agreement modifying or taking the place of the guaranty, had an equitable right in the event of default of the defendant to be subrogated to the rights of the defendant under the contract with the telephone company. The controlling rule in this respect is stated as follows in the case of In re Estate of Williams, 148 Neb. 208, 26 N. W. 2d 847: "Where a guarantor, who has entered into a contract of guaranty at the request of, or with the consent of, the principal obligor, pays or is compelled to pay his principal's debt, the law raises an implied promise, unless there is an express one, on the part of the principal to reimburse the guarantor, and on payment of the debt the guarantor at once has a right of action against the principal for reimbursement of the amount which he has paid, with interest thereon at the legal rate." See, also, Dakota County v. Central Bridge & Constr. Co., 136 Neb. 118, 285 N. W. 309.

It is to be observed that this implied promise is by

its terms inapplicable in the event that there is an express promise on the part of the principal.

The reasonable inference to be drawn from the stipulation of facts is that the contract of the defendant with the intervener contained in the performance bond was breached before the assignment was given. It is substantially contended that on that account the implied promise attending the guaranty bond was still in full force and effect.

By what was said as follows in Moore v. Markel, 112 Neb. 743, 201 N. W. 147, it is inferable that the rule is limited to instances where a change is made before a breach has occurred: "The rule of law applicable is that a contract, containing mutual obligations of the parties, may, at any time after it has been made and before a breach has occurred, be changed or modified in one or more of its details by a new agreement, by mutual consent of the parties, without any new, independent, or distinct consideration."

This pronouncement has no application to the present situation, whether the assignment was made before or after breach. The assignment was a new written agreement based upon "a good and valid consideration" between the defendant and the intervener of which the telephone company was given due notice, the clear and obvious purpose of which was to allocate funds owing by the telephone company under the contract with the defendant first to the payment of such obligations as that represented by the judgment in favor of the plaintiff and against the defendant. It is not contended that such an agreement based upon a valid consideration would be invalid. This agreement by its terms took the place of the implied promise attendant upon a breach of the agreement of guaranty.

In the light of these observations and of the stipulated fact that the telephone company had sufficient money which was due and owing under the contract between it and the defendant to pay the judgment of the plain-

tiff within the meaning of and pursuant to the assignment, the judgment of the district court herein involved is affirmed.

AFFIRMED.

SIMMONS, C. J., not participating.

STATE OF NEBRASKA EX REL. JOHN R. BROGAN, APPELLANT, V. HAROLD F. BOEHNER, APPELLEE.

119 N. W. 2d 147

Filed January 25, 1963. No. 35314.

1. **Quo Warranto: Officers.** A person claiming an office that is usurped or invaded by another may maintain an action in quo warranto upon his own relation under section 25-21,146, R. R. S. 1943, if the prosecuting attorney refuses or neglects to file the information after application to him for that purpose.
2. **Quo Warranto.** In an action brought under section 25-21,146, R. R. S. 1943, the relator is not required to file the bond required by section 25-21,122, R. R. S. 1943.
3. **Elections: Officers.** Where there is no territorial restriction upon the authority of the officer who administered the oath to an absentee voter, the failure of the certificate of the officer to state the place of the execution of the oath and certificate does not invalidate the ballot.
4. **Affidavits.** Where the venue is omitted from an affidavit there is a presumption that the officer acted within his jurisdiction.
5. **Elections: Officers.** Where the certificate of the officer who administered the oath to an absentee voter, together with other information appearing on the identification envelope, fairly indicates that the officer who administered the oath and executed the certificate was authorized to do so by section 32-813, R. R. S. 1943, the ballot is valid.
6. **Elections.** A party who wishes to dispute an election upon the basis that illegal votes were cast has the burden of proving for which candidate the illegal votes were cast.
7. ———. Where the record does not clearly show what the result of an election should be, the court will not substitute its judgment for that of the electorate as declared by the proper authorities.
8. ———. McMaster v. Wilkinson, 145 Neb. 39, 15 N. W. 2d 348, 155 A. L. R. 667, overruled in part.

Appeal from the district court for York County: JOHN D. ZEILINGER, Judge. Affirmed.

Ginsburg, Rosenberg & Ginsburg and Norman Krivosha, for appellant.

Waring & Gewacke, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an action in quo warranto brought by John R. Brogan as relator against Harold F. Boehner as respondent. Both the relator and the respondent were candidates at the 1960 general election for the office of district director of Consumers Public Power District, District No. 5. The canvassing board declared the respondent elected. The relator then brought this action to oust the respondent from the office and to declare the relator to be entitled to the office. The trial court found generally for the respondent and dismissed the action. The relator's motion for new trial was overruled and he has appealed.

By various pleadings filed in the trial court the respondent questioned the right of the relator to maintain the action without filing a surety bond as provided in section 25-21,122, R. R. S. 1943. This section, which was a part of the original Code of Civil Procedure, was amended in 1921 to provide that where the action is instituted by a person other than the county attorney, a bond shall be filed with the information.

The relator contends that the action is brought under section 25-21,146, R. R. S. 1943. This section was originally enacted as a part of a separate statute by the Territorial Legislature in 1858. Laws 1858, p. 232.

The distinction between the two sections was recognized in Thompson v. James, 125 Neb. 350, 250 N. W. 237. In that case this court said: "By section 20-21,137, Comp. St. 1929, a citizen of the state claiming an office

that is usurped or invaded by another may maintain this form of action in a district court with or without the consent of the prosecuting attorney, upon his own relation. * * * Relators are given capacity to maintain this action by the above cited section of the statute upon their own relation, and are not required to comply with section 20-21,113, Comp. St. 1929, which provides for such an action by an elector, upon refusal of the prosecuting officer to bring the action and upon the giving of bond for costs, attorney's fee and prosecution without delay."

The relator in this case was authorized to bring the action upon his own relation and was not required to file a bond for costs, attorney's fee, and prosecution without delay.

The principal controversy concerns the validity of certain ballots cast by absentee or disabled voters and the effect to be given to invalid ballots. The ballots in question may be grouped into several categories, each of which will be discussed separately.

The first category consists of 11 ballots, cast by absentee voters, which were counted by the canvassing board and the trial court. The relator contends that these ballots should not have been counted because in each case the certificate of the official who administered the oath to the voter fails to state where the oath and certificate was executed. The statute provides that the certificate shall state "* * * the date of the execution of the oath and certificate and the place of such execution, if the voter is not in the military or naval service of the United States * * *." § 32-810, R. R. S. 1943. None of the voters were in the military or naval service of the United States.

The form of the oath and certificate is printed in blank upon the reverse side of the identification envelopes in which the ballots were returned to the county clerk. Above the oath is printed: "State of _____, County of _____." In each case these blanks

were filled in to indicate that the oath was executed in a county in Nebraska. However, the postmark on 10 of the envelopes shows that they were mailed from outside of the State of Nebraska.

Each of the certificates was executed by a commissioned officer in the armed forces of the United States. Section 32-813, R. R. S. 1943, authorizes any commissioned officer in the armed forces of the United States to administer oaths, make certificates, and perform such other acts as are necessary to enable a voter to exercise his absent voting privilege. The trial court held that there had been a substantial compliance with the statute, and that any failure of the certificates to state the place of execution was not a material defect because there was no territorial restriction upon the authority of the officers who executed the certificates. We arrive at the same conclusion and hold that the 11 ballots were properly counted.

The second category consists of 8 ballots, cast by sick and disabled voters of York County, Nebraska, which were not counted by the canvassing board and the trial court. The relator contends that these ballots should have been counted.

The parties stipulated that these ballots were rejected by the canvassing board because the venue shown on each of the identification envelopes was "State of York, County of York" and in each instance they were notarized in York County, Nebraska. The trial court found that these ballots should not be counted for the same reason.

The certificate on one of the identification envelopes is not dated, and there is no other evidence showing when the ballot contained therein was voted. We find that this ballot should not be counted.

As to the remaining 7 ballots, the evidence shows a compliance with the statute in all respects except that the venue is shown to be "State of York." The re-

spondent concedes in his brief that there is no State of York and we take judicial notice of that fact.

So far as these ballots are concerned, the situation is the same as if the venue had been left blank so that the venue would have read: "State of _____." Where no venue is shown, there is a presumption that the officer acted within his jurisdiction. Merriam v. Coffee, 16 Neb. 450, 20 N. W. 389; Crowell v. Johnson, 2 Neb. 146.

The respondent relies upon Miller v. Mersch, 152 Neb. 746, 42 N. W. 2d 652, and McMaster v. Wilkinson, 145 Neb. 39, 15 N. W. 2d 348, 155 A. L. R. 667. In Miller v. Mersch, *supra,* the venue was shown to be Thayer County, Nebraska, but the jurat indicated the oath had been administered in the Province of Saskatschewan, Canada, and no seal was affixed. In McMaster v. Wilkinson, *supra,* the venue was shown to be Adams County, Nebraska, and Saunders County, Nebraska, but the seal of the notary public indicated that he was a notary public of Sarpy County, Nebraska. In each of these cases the record on its face indicated that the authority of the officer administering the oath and executing the certificate did not extend to the county where the oath was administered and the certificate executed.

The evidence here is that the oaths were administered and the certificates executed by an officer who was duly authorized to act. The certificates on the identification envelopes for these ballots were executed by C. T. Moline. The evidence, including the seal affixed to the certificates, shows that C. T. Moline was a notary public of York County, Nebraska, at the times the certificates were executed. The evidence supports a finding that these ballots were voted, the oath taken, and the certificates executed in York County, Nebraska. We find that these 7 ballots should have been counted.

The third category consists of 7 ballots, cast by absentee voters, which were counted by the canvassing board and the trial court. The relator contends that

these ballots should not have been counted because it does not appear that the oaths were administered and the certificates executed by a duly authorized officer.

Section 32-813, R. R. S. 1943, provides that the oath of an absentee, sick, or disabled voter may be subscribed and sworn to before any commissioned officer, noncommissioned officer not below the rank of sergeant, or petty officer, in the armed forces of the United States, and that any such official may make the certificate and do and perform such other acts as are necessary to enable a voter to exercise his absent, sick, or disabled voting privilege.

The certificate on the identification envelope for one of the ballots shows that it was executed by an "Executive Officer, USWB." This description does not identify the officer as one of those authorized by section 32-813, R. R. S. 1943, and this ballot should not have been counted.

The certificate on the identification envelope for one of these ballots was executed by "Lt/Col Sara C. Hall, Chief of Nursing Service." The voter is identified by the oath as being a member of the Nursing Corps, United States Air Force. Although the identification of the officer executing the certificate is not as complete as it should have been, there was a substantial compliance with the statute, and we find that this ballot should have been counted.

The officers who executed the certificates on the identification envelopes for the other 5 ballots were identified as follows: "1/Lt. USMC"; "Captain, Inf."; "Captain United States Air Force"; "Lieutenant, USNR"; and "1/Lt USAF." This was a substantial compliance with the statute and these ballots should have been counted.

When the 7 ballots, cast by sick and disabled voters of York County, Nebraska, are counted and added to the number of votes cast for each of the parties as declared by the canvassing board, the relator is found to

have received 7,833 votes and the respondent 7,835 votes.

In the district court the relator contended that 109 invalid ballots had been counted. The trial court found that 90 invalid ballots had been counted. On appeal, the relator has contended that 18 ballots held valid by the trial court were invalid and should not have been counted. Of the 18 ballots questioned on appeal, we find that 17 were valid. We therefore conclude that 91 invalid ballots were counted. The remaining question is how these ballots affect the result of the election.

The ballots cast by absentee and disabled voters are separated from their identification envelopes when they are counted by the canvassing boards. § 32-817, R. R. S. 1943. After the ballots have been removed from the identification envelopes and counted, there is no way to identify a ballot as having been contained in a particular identification envelope.

There is no evidence as to how the 91 invalid ballots were cast. There is no showing as to how many of these ballots were voted for each of the candidates. It is probable that some of the invalid ballots were not cast for either candidate.

The general rule is that a party who wishes to dispute an election upon the basis that illegal votes were cast has the burden of proving for which candidate the illegal votes were cast. It is a necessary incident to proving that the illegal ballots affected the result of the election. The requirement is statutory in election contests. § 32-1001, R. R. S. 1943. In Mehrens v. Election Canvassing Board, 134 Neb. 151, 278 N. W. 252, this court held: "In an election contest on the ground that, through 'ignorance and mistake' of election officers, enough illegal votes were cast in a voting precinct to change the result of the election, the burden is on contestant to prove the casting of the illegal votes and also the candidates for whom they were cast."

In a recent decision, Arends v. Whitten, 172 Neb. 297,

109 N. W. 2d 363, this court followed the rule of the Mehrens case and held that where no attempt was made to show how allegedly unqualified voters had actually voted, the appellant's contentions in regard to such illegal ballots would be disregarded.

The relator relies upon McMaster v. Wilkinson, *supra,* and contends that the invalid ballots should be deducted proportionately from the total votes received by the relator and the respondent. In the McMaster case this court held: "When illegal ballots have been cast, the loss due to such ballots should be so apportioned that each candidate shall have deducted a share of them, proportioned according to the whole number of votes received by him."

In the McMaster case, which was an election contest between two candidates for the office of city councilman in the city of Lincoln, Nebraska, the court found that 5 illegal absentee and disabled ballots had been counted. The court found in that case that the contestant had a plurality of 9 votes. The result of the election would not have been affected if the entire 5 votes had been deducted from the total vote of the contestant.

The relator contends that the formula set out in the McMaster case should be used in this case on a county-by-county basis. If that were done, the result would be that the relator would have a plurality of approximately 2 votes. However, if the invalid ballots are deducted on the basis of the "entire vote" or "whole number of votes" received by each candidate, the result is unchanged.

The authority cited in the opinion in the McMaster case is McCrary on Elections (4 Ed.), § 495, p. 364. The rule is stated there as follows: "In purging the polls of illegal votes, the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidate having the largest num-

ber. Of course, in the application of this rule such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each."

In discussing the rule stated above, Judge McCrary further states in §§ 496, 497, pp. 365, 366: "This is probably the safest rule that can be adopted in a court of justice, where there is no power to order a new election, and where great injury would result from declaring the office vacant; but it is manifest that it may sometimes work a great hardship, inasmuch as the truth might be, if it could be shown, that all the illegal votes were on one side, while it is scarcely to be presumed that they would ever be divided between the candidates in exact proportion to their whole vote. * * * Let it be understood that we are here referring to a case where it is found to be impossible by the use of due diligence to show for whom the illegal votes were cast. If in any given case it be shown that the proof was within the reach of the party whose duty it was to produce it, and that he neglected to produce it, then he may well be held answerable for his own neglect; and because it was his duty to show for whom the illegal votes were cast, and because he might, by the use of reasonable diligence, have made this showing, it may very properly be said that he should himself suffer the loss occasioned by deducting them from his own vote."

In Paine on Elections, § 513, p. 433, the author states: "Where illegal votes have been cast the true rule is to purge the poll, by first proving for whom they were cast, and thus ascertain the real vote; but, if this cannot be done, then to exclude the poll altogether. This is safer than the rule which arbitrarily apportions the fraud among the parties."

The author further states on p. 434: "In the total absence of proof tending to show for whom illegal votes, sufficient in number to affect the result, were cast, the duty of the court would seem to be to choose,

as wisely as possible, between a disregard of the illegality and a rejection of the entire precinct vote. There ought to be no arbitrary presumption of law, either that all the illegal votes were cast by the political party in the majority, or that they were cast by different parties in proportion to their numbers. To take the illegal votes all from one candidate, or pro rata from several candidates, would be, not to decide, but to make a case for the parties." See, also, Hamilton v. Marshall, 41 Wyo. 157, 282 P. 1058, 66 A. L. R. 1154.

We do not believe that courts should adopt and apply arbitrary rules which will determine elections upon the basis of chance. This court will not substitute its judgment for that of the electorate as declared by the proper authorities unless the record shows clearly what the result of the election should be. The record in this case fails in that respect.

To the extent that McMaster v. Wilkinson, *supra*, conflicts with this opinion, it is overruled.

The judgment of the district court declaring the respondent elected and dismissing the action of the relator is affirmed.

AFFIRMED.

SIMMONS, C. J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JACK MARION, APPELLANT.
119 N. W. 2d 164

Filed January 25, 1963. No. 35332.

1. **Homicide.** A purpose to kill and malice are material elements of murder in the second degree, and, under a charge therefor, the burden is on the State to prove both beyond a reasonable doubt.
2. **Homicide: Trial.** Where the evidence and circumstances of a crime are such that different conclusions may properly be drawn therefrom as to the degree, the question of degree is for the determination of the jury.

3. **Homicide.** In a prosecution for homicide the unlawful killing is the principal fact to be determined, but the condition of the mind of the accused and the attendant circumstances determine the degree of the crime.
4. ———. If the fact of the homicide is established, but the circumstances of it are not fully shown on the trial so that the jury can judge from the circumstances whether or not it was intentional, the law presumes legal malice; but if the circumstances of the homicide are all established by the evidence at the trial, then the law creates no presumption of malice and the issue as to it is one of fact to be determined by the jury from all the evidence and circumstances surrounding the homicide.
5. **Criminal Law: Trial.** It is not the province of this court to resolve conflicts in the evidence in criminal actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

O'Sullivan & O'Sullivan, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

The defendant, Jack Marion, was charged with the crime of murder in the second degree. The jury returned a verdict of guilty, and defendant was sentenced to a term of 15 years at hard labor in the State Penitentiary. The case is before this court for review.

The evidence shows that defendant called the police department of the city of Omaha about 2:30 a.m. on December 3, 1960, stating that his wife needed the rescue squad, and to send an ambulance. Police patrolmen were immediately dispatched to the home of the defendant. Two patrolmen testified that they found Martha Ann Marion, the wife of the defendant, dying on a bed in the home. Her chest was covered with blood from a bullet wound. A .25-calibre automatic

pistol was found on the dresser. A shell was in the firing chamber and one shell remained in the magazine. Two spent cartridges were found on the floor near the bed. One slug was found on the bed near the deceased and another was found on the bed the next day. Defendant told the police that he pulled the gun from his pocket and that it went off and hit the deceased. One of the two policemen testified that defendant was in an intoxicated condition.

One Opal Lee, a cousin of the deceased, lived with the Marions and slept in an adjoining bedroom with the children. She testified that she was awakened by an argument between defendant and his wife. She went into the Marion bedroom and asked them to quiet down. She testified that defendant had the gun in his hand at that time and that defendant and deceased were "fighting." She heard the defendant say to his wife that if she kept on doing what she was doing he would beat her up. Opal returned to her room and went back to sleep. She was again awakened by a shot, the sound of which came from the Marion bedroom. At the request of defendant she went to a neighbor to call the police and an ambulance. She was unable to arouse the neighbor and did not make the call.

A physician who performed an autopsy on the body of the deceased testified that the body had been pierced in three places. The entrance and exit wounds were plainly discernible. One bullet passed through the left hand at the base of the thumb. A bullet also passed through the fleshy part of the right arm about 4 inches below the elbow. He testified that these two bullet wounds could have been caused by the same bullet. Another bullet entered the chest about 2 inches to the left of the midline and left the body about 2 inches to the left of the spine. This bullet passed through the lobes of the lung and was the cause of death.

The defendant testified to the following: On the afternoon of December 2, 1960, he picked up his wife

at the place of her employment and took her home in his automobile. He then returned to the liquor store where he worked. At about 10:30 p.m. he observed Opal Lee and his 2½-year-old daughter near the place of his employment. He took them home in his automobile and returned to his work. His wife was not home at that time. He completed his work about 2 a.m. and went home, arriving there about 2:20 a.m. When he left the liquor store he put a gun in his pocket. He said the gun had been left with him 3 weeks before by a friend as security for a small loan. He took it home because his superiors had told him that no firearms were to be kept about the liquor store.

Upon his arrival home he walked directly to the bedroom without removing his overcoat. The light was on. His wife was sitting on the bed in nightclothes. He asked her where she had been. She answered that she had been over to her cousins. He said he thought she should have stayed with the children instead of sending them to a show with Opal Lee. He said there was no argument or loud talking. He pulled the gun from the side pocket of his overcoat to lay it on the dresser. As he pulled it out of his pocket it went off and hit the deceased. He said the gun struck nothing as he lifted it from his pocket. He did not pull the trigger. He said there was but one shot fired and it was accidental. He testified that he had his finger inside the trigger guard when he took the gun from his pocket. He at no time looked to see if the pistol was on "safety." He did not know that a shell was in firing position. He said his wife threw up her left hand just before the gun fired. He testified that he called the police to get the rescue squad and an ambulance. He said he had not been drinking before he got home but that he drank an 8-ounce glass of whiskey while waiting for the police.

It is the contention of defendant that the evidence is insufficient to sustain a finding that the killing was

malicious and purposeful as required by section 28-402, R. R. S. 1943. This constitutes the only real issue in the case.

The defendant argues that the evidence shows that the death of Martha Ann Marion was an accident and that there is nothing on which a jury could find that it was malicious and purposeful. We think the evidence is sufficient to sustain the verdict of the jury. We shall briefly review the evidence which we think sustains the finding.

The defendant put the gun in his pocket on the night in question to take it home because his employers forbade the keeping of firearms at the liquor store, although he had kept it there for the 3 weeks previous. When he took Opal Lee and his little daughter home at about 10:30 he looked for his wife but she was not there. When he left the liquor store he dropped the gun in his pocket without looking to see if it was on "safety." On arriving home he went directly to the bedroom and questioned his wife as to where she had been. Opal Lee testified that she was awakened by a loud argument between defendant and his wife. She went to their bedroom to quiet them down and saw the defendant brandishing the gun. She heard defendant threaten to beat up the deceased. She returned to her bedroom and went back to sleep. She was awakened later by a pistol shot. The defendant said that it fired once and that he did not pull the trigger. It is conclusively established that the gun was fired at least twice; first, by the bullet holes in the body and, second, by the two spent shells and the two slugs found at the scene of the shooting incident. While it is true that guns are sometimes accidentally discharged, it is most unusual, to say the least, that a gun would accidentally discharge twice into the same human body in so short a space of time. Defendant admits that the deceased threw up her left hand as he drew the gun from his pocket. She was shot through the hand when it was raised evidently

to ward off an impending danger. While there was some conflict in the evidence, particularly between that of defendant and Opal Lee, the determination of such conflicts was for the jury. The jury could find from the foregoing evidence, and all the circumstances testified to, that defendant killed the deceased maliciously and purposely.

In Clown Horse v. State, 170 Neb. 336, 102 N. W. 2d 625, the court cited many authorities supporting the following rule in this state: "In a prosecution for murder in the second degree, when the fact of unlawful killing is proved and no evidence tends to show express malice on the one hand or any justification on the other, the law presumes malice. There is an inference that the killing was intentionally done. The crime of murder in the second degree is established, and the evidence requires the submission of the case to the jury." See, also, Chadek v. State, 138 Neb. 626, 294 N. W. 384.

In Woodard v. State, 159 Neb. 603, 68 N. W. 2d 166, this court said: "Where the evidence and circumstances of the crime are such that different conclusions may properly be drawn therefrom as to the degree, the trial court is without error in submitting the different degrees to the jury for its determination."

The defendant relies primarily on the case of Childs v. State, 120 Neb. 310, 232 N. W. 575, to secure a reversal. In that case the deceased before his death gave a statement that he and the defendant had never quarreled and that they were like brothers. The evidence did not establish that more than one shot struck the deceased and that was in the left hip and right leg. The deceased died about 2 weeks after he was shot of traumatic pneumonia. In the case before us the shooting was preceded for a period of time by loud arguments, fighting, a threat to injure, and a brandishing of the gun. The claim of an accidental firing of the gun is dissipated by the physical facts conclusively establishing that at least two shots were fired. While it

is true, as in the Childs case, that defendant showed some remorse for his act immediately following the shooting, it is not entitled to the weight given it in the Childs case under the circumstances shown in the instant case. In the case before us there is evidence that defendant said he would beat his wife up if she didn't stop doing what she was doing. There was no evidence of such threats in the Childs case. Because of these differences in the evidence we think the Childs case is distinguishable from the case at bar.

It is not the province of this court to resolve conflicts in the evidence in criminal actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761.

The trial court properly overruled the motions of defendant for a directed verdict. The verdict of the jury is sustained by the evidence and the judgment is affirmed.

AFFIRMED.

WELLS C. JONES, APPELLANT, V. VILLAGE OF FARNAM ET AL., APPELLEES.

119 N. W. 2d 157

Filed January 25, 1963. No. 35344.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.
2. ———. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof.
3. **Municipal Corporations: Courts.** Courts will not review or inquire into the legislative acts of municipal boards concerning matters within their power, as to whether they acted expediently, wisely, or necessarily. Such are matters of purely legislative function, and not of judicial concern.
4. **Constitutional Law: Taxation.** In this jurisdiction an oppor-

tunity to be heard with right of review upon the question of assessments for benefits is all that is required to satisfy the due process provisions of the Constitutions of Nebraska and the United States.

5. **Appeal and Error.** An issue not presented in the trial court may not be raised for the first time in the Supreme Court.

Appeal from the district court for Dawson County: CLARENCE S. BECK, Judge. Affirmed.

Wells C. Jones, pro se.

Schroeder & Schroeder, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

Wells C. Jones, the plaintiff, brought this action to enjoin the Village of Farnam and its board of trustees, defendants, from proceeding with the construction of a sanitary sewerage system in the village of Farnam under a resolution of necessity and a resolution ordering construction, for a judgment declaring the resolution of necessity and the resolution ordering construction null and void, and for a permanent injunction against the Village of Farnam and its board of trustees enjoining said defendants permanently from proceeding with the project under the above-designated resolutions.

For convenience we will refer to the parties as they are designated in the district court.

The trial court denied the plaintiff's application for a temporary injunction against the defendants.

The defendants demurred generally to the petition and to the plaintiff's amended petition. The plaintiff desired not to plead further. The trial court dismissed the plaintiff's amended petition. The plaintiff perfected appeal to this court.

The plaintiff's amended petition, insofar as need be considered in this appeal, alleged in substance as follows: That the Village of Farnam is a municipality in-

corporated under the laws of the State of Nebraska, with a population of 260 people; that the plaintiff is the owner of certain real estate which is described in the petition; and that the plaintiff brought this action on his own behalf and on behalf of all other owners of real estate located in the Village of Farnam, hereinafter referred to as the village, either resident or nonresident thereof, similarly situated. The petition then set forth the names of the duly elected, qualified, and acting members of the board of trustees of the village, hereinafter referred to as the board. The amended petition further alleged that on March 21, 1962, the board, at a special meeting, introduced and placed on file a resolution of necessity, wherein the board declared it advisable and necessary to build a sanitary sewer system in the village, to be financed by general obligation bonds of the village, together with assessments against abutting property according to the benefits to be derived; that thereafter under dates of March 29, 1962, and April 5, 1962, the board caused to be published in the Farnam, Nebraska, Press, a weekly newspaper published in the village, a legal notice setting forth the provisions of the resolution of necessity and stating that the resolution of necessity would be considered for passage by the chairman and the board at a meeting to be held at the community hall in the village on April 13, 1962, at which time and place the chairman and the board would hear objections as to the passage of the resolution of necessity and the making of the proposed improvement; that no personal notices of the meeting were ever served on any owners of real property located in the village by the board or its attorneys; that no copies of the published legal notice were ever sent by or through the United States mail to any owners of real property located in the village, including the plaintiff, by the board or its attorneys, nor was any affidavit of the mailing of such published notice ever made by the board or by its attorneys as required by

sections 25-520.01 to 25-520.03, R. S. Supp., 1961; that notwithstanding the failure of the board and of its attorneys to give personal notices to any owners of the real estate in the village, and the failure of the board and its attorneys to comply, or attempt to comply, with the provisions of the statutes above cited, the board did, on April 13, 1962, hold a meeting in the community hall in the village and did consider the passage of the resolution of necessity and the making of the improvement, and thereafter on April 13, 1962, did pass a resolution of necessity and a resolution ordering construction; that the passage of the resolution of necessity and the resolution ordering construction by the board, without first having given personal notice to the plaintiff and other owners of real estate located in the village, resident or nonresident, who were similarly situated, violated Article XIV, section 1, Amendment to the Constitution of the United States, and the provisions of Article I, section 3, of the Constitution of the State of Nebraska (known as the due process clause in both Constitutions) and rendered the resolution of necessity and the resolution ordering construction null and void; and that the passage of the resolution of necessity without compliance, or without attempted compliance by the board or its attorneys, with the provisions of the above-cited sections of the statutes, rendered the resolution of necessity null and void. The plaintiff's amended petition then set forth certain facts relating to irreparable damage that would result to the plaintiff and owners of real estate in the village unless the defendants were restrained from proceeding with the construction of the sewer system under the provisions of the resolution of necessity and the resolution ordering construction, and alleged that the plaintiff and others similarly situated had no adequate remedy at law.

An exhibit attached to the petition consists of the legal notice to the effect that at a special meeting of the chairman and the board held on March 21, 1962,

there was introduced and placed on file the resolution of necessity which is set forth, which resolution would be considered for passage by the chairman and the board at a meeting to be held at the community hall in the village on April 13, 1962, at 8 p.m., at which time and place the chairman and members of the board would hear objections as to the passage of the resolution and to the making of the proposed improvement; that thereafter the resolution might be amended and passed, or passed as proposed; and that any petition opposing the resolution of necessity should be filed with the clerk of the village within 3 days before the date of the meeting for the hearing of the proposed resolution of necessity. Then follows the resolution of necessity.

"A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact." Elliott v. City of Auburn, 172 Neb. 1, 108 N. W. 2d 328. See, also, Gerard v. Steinbock, 169 Neb. 828, 101 N. W. 2d 194.

In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof. See, Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150; Elliott v. City of Auburn, *supra*.

The plaintiff assigns as error that the trial court erred in sustaining the general demurrer of the defendants to the amended petition of the plaintiff, and in dismissing the plaintiff's amended petition.

Section 6 of the resolution of necessity set forth in the legal notice reads in part as follows: "To pay the cost of improvements herein provided for, the Chairman and Board of Trustees will, after such improvements have been completed and accepted by the Village, cause to be issued the negotiable bonds of the Village to be called 'Sewer Bonds'. The main and lateral sewers, to the extent that they specially serve and specially benefit the abutting property, are declared to be local improvements and the cost thereof, to the extent of the

special benefits accruing to the abutting property from the construction of said sewers, shall be assessed on such abutting property as provided by law."

Section 17-913, R. R. S. 1943, provides in part: "Whenever * * * the board of trustees of any village, shall deem it advisable or necessary to build, * * * a sanitary sewer system * * * it shall declare the advisability and necessity therefor in a proposed resolution, * * *. The proposed resolution shall state the amount of such estimated cost. The * * * board of trustees shall have power to assess, to the extent of special benefits, the cost of such portions of said improvements as are local improvements, upon properties found especially benefited thereby; and the resolution, hereinabove mentioned, shall state the outer boundaries of the district or districts in which it is proposed to make special assessments."

In the instant case the engineers' estimate of the cost of such improvement was $74,000.

The legal notice described the outer boundaries of the district in which it was proposed to make special assessments.

Section 17-914, R. R. S. 1943, provides in part: "Notice of the time when any such resolution shall be set for consideration before the * * * board shall be given by at least two publications in a newspaper of general circulation published in the * * * village, which publication shall contain the entire wording of the resolution. The last publication shall be not less than five days nor more than two weeks prior to the time set for hearing of objections to the passage of any such resolution, at which hearing the owners of the property which might become subject to assessment for the contemplated improvement may appear and make objections to the proposed improvement. Thereupon the resolution may be amended and passed or passed as proposed."

Section 17-916, R. R. S. 1943, provides: "If a peti-

tion, opposing the resolution, signed by property owners representing a majority of the front footage which may become subject to assessment for the cost in any proposed lateral sewer district, be filed with the clerk within three days before the date of the meeting for the hearing on such resolution, such resolution shall not be passed."

The foregoing sections, as will be obvious, are applicable to the creation of a sanitary sewer district as applied to the village in question, and the published legal notice heretofore mentioned discloses that the board of the village complied with said provisions of the statutes.

The cardinal provisions of the statutes relied upon by the plaintiff are as follows.

Section 25-520.01, R. S. Supp., 1961, provides in part: "In any action or proceeding of any kind or nature, as defined in section 25-520.02, where a notice by publication is given as authorized by law, a party instituting or maintaining the action or proceeding with respect to notice or his attorney shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action or proceeding whose name and post-office address are known to him. Proof by affidavit of the mailing of such notice shall be made by the party or his attorney and shall be filed with the officer with whom filings are required to be made in such action or proceeding within ten days after mailing of such notice. Such affidavit of mailing of notice shall further be required to state that such party and his attorney, after diligent investigation and inquiry, were unable to ascertain and do not know the post-office address of any other party appearing to have a direct legal interest in such action or proceeding other than those to whom notice has been mailed in writing."

Section 25-520.02, R. S. Supp., 1961, provides in part: "The term action or proceeding means all actions and

proceedings in any court and any action or proceeding before the governing bodies of municipal corporations, * * * and political subdivisions for the equalization of special assessments or assessing the cost of any public improvement."

Section 25-520.03, R. S. Supp., 1961, provides: "Sections 25-520.01 to 25-520.03 are intended by the Legislature to be cumulative and supplemental to existing legislation. They are deemed to be a matter of general statewide concern. Such sections applies to all parties authorized by law to give notice by publication, including the State of Nebraska, its governmental subdivisions, and all public and municipal corporations."

Article XIV, section 1, Amendment to the Constitution of the United States, provides in part: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

Article I, section 3, of the Constitution of the State of Nebraska, provides: "No person shall be deprived of life, liberty, or property, without due process of law."

It is the contention of the plaintiff that the foregoing provisions of the statutes must be complied with, otherwise any action taken by the board to pass resolutions as hereinbefore set forth is illegal and void.

The case of Salsbury v. City of Lincoln, 117 Neb. 465, 220 N. W. 827, was a suit in equity to restrain the city of Lincoln and its city commissioners from entering into a contract for the paving of streets. A general demurrer was interposed to the petition, and the demurrer was sustained. The judgment of the trial court was affirmed. This court said: "It is a well-established doctrine that courts will not inquire into or endeavor to control the legislative discretion of city councils in establishing the boundaries of paving districts, nor will they inquire into the motives of legislative bodies, when acting within legal and constitutional limits, nor determine matters concerning the expediency or necessity for such legislation. The acts of legislative bodies,

whether state or municipal, if performed within the prescribed limits, are not subject to revision or control by the courts on the ground of inexpediency, injustice or impropriety. Such are purely functions of legislative power. Neither will the courts take cognizance over matters involving the wisdom or necessity for the enactment of legislation. The legislative body may alone determine whether a certain piece of legislation is needed or advisable for the general government of the people from whom its power emanates. The concern of the courts is as to the limits of the power, and not the manner or method by which the power is sought to be exercised, if kept within the prescribed limits. Therefore, judicial inquiry is strictly one of power, and not of expediency. To do otherwise would amount to an unwarranted encroachment by the judicial branch of the government upon the powers of the legislative branch and thus tend to destroy the necessary coordination existing between these two separate branches. The principle was adopted by this court in Omaha & C. B. Street R. Co. v. City of Omaha, 114 Neb. 483 (208 N. W. 123); Enders v. Friday, 78 Neb. 510 (111 N. W. 140); Village of Bellevue v. Bellevue Imp. Co., 65 Neb. 52 (90 N. W. 1002). This court in the quite recent case of Whitla v. Connor, 114 Neb. 526 (208 N. W. 670), adopted this general principle, wherein it held: 'The action of the village board in ordering sidewalk placed, and providing that cost thereof shall be assessed upon the abutting lot, is a legislative determination that the improvement is expedient and proper, and that such property will be benefited by reason thereof, and such determination cannot be denied its effect in a judicial proceeding, in a case where it was within the board's power to so act. And one challenging its authority carries the burden of alleging and proving the invalidating facts.' In the event that the proposed improvement would not benefit plaintiff's property or become an injury thereto, these are matters that can be properly

considered by the assessing board in levying special assessments, and the plaintiffs have an adequate remedy at law by which to determine the justice of such assessments."

In the instant case the defendants complied with the requirements of section 17-914, R. R. S. 1943. Ample opportunity is given by section 17-916, R. R. S. 1943, to make objections to the creation of a sanitary sewer system by the municipal authorities. No petitions protesting the resolution filed with the village clerk were made. The plaintiff failed to file a petition or to object at the public hearing held on this matter, as provided for in the legal notice heretofore set forth.

The following authorities are also applicable to this appeal.

In Elliott v. City of Auburn, *supra,* this court said: "As stated in Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397: 'In Utley v. St. Petersburg, 292 U. S. 106, 54 S. Ct. 593, 78 L. Ed. 1155, it was said: "There is no constitutional privilege to be heard in opposition at the launching of a project which may end in an assessment. It is enough that a hearing is permitted before the imposition of the assessment as a charge upon the land * * * or in proceedings for collection afterwards.'

"In Hoopes v. City of Omaha, 99 Neb. 460, 156 N. W. 1047, the court, quoting from Londoner v. City and County of Denver, 210 U. S. 373, 28 S. Ct. 708, 52 L. Ed. 1103, said: '"In the exercise of this authority the city council, in the ordinance directing the improvement to be made, adjudged, in effect, that a proper petition had been filed. (In the instant case the city council so adjudged as a question of fact.) * * * The only question for this court is whether the charter provision authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authoriz-

ing the work did not include any assessment, or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded." ' "

In Freeman v. City of Neligh, 155 Neb. 651, 53 N. W. 2d 67, the plaintiffs sought to enjoin the defendants, City of Neligh, a municipal corporation of the second class, the mayor thereof, and four individuals allegedly purporting to be members of the city council, from entering into contracts for street improvements, issuing bonds, and levying special assessments to pay therefor under an alleged null and void ordinance. The trial court sustained the motion to dismiss the plaintiffs' action for want of any lawful right and sufficient evidence to entitle plaintiffs to injunctive relief as prayed. The judgment of the trial court was affirmed. This court said: "As stated in Field v. Barber Asphalt Co., 194 U. S. 618, 24 S. Ct. 784, 48 L. Ed. 1142, '* * * It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the State from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed.' * * * It is now elementary in this jurisdiction as well as elsewhere that an opportunity to be heard with right of review upon the question of assessments for benefits is all that is required to satisfy the due process provisions of the consitutions."

The case of Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N. W. 2d 599, was a suit by a landowner and his wife to enjoin the defendants from giving effect to an order of the county superintendent of schools detaching certain lands of plaintiffs from School District No. 50 and annexing such lands to the School

District of the city of Bridgeport. The district court held the proceedings to be void. The School District of the city of Bridgeport and the members of the board of education appealed. This court said: "It is next contended that the notice of hearing given by the county superintendent was insufficient and voids the proceedings in that personal service was not had upon the plaintiffs, pursuant to sections 25-520.01 to 25-520.04, R. S. Supp., 1957." These are the same as the sections above set out. The court held that the plaintiffs did not have a direct legal interest within the meaning of section 25-520.01, R. S. Supp., 1957; and that the plaintiffs, as the owners of land being transferred to another school district, did not have a direct legal interest in the fixing of school district boundaries. The court said: "Even though a minority voter may have the right to test the regularity of the proceedings by review in the district court and to attack such proceedings collaterally if they be entirely void, such voter cannot be said to have the direct legal interest contemplated by the cited sections of the statute. * * * The implications of this section (25-520.02, R. S. Supp., 1957) are that matters of general concern to all taxpayers, such as the levy and assessment of property for general tax purposes, are not within the purview of this section. The statute means that it has application to matters of a direct interest to a taxpayer which is not common to all other taxpayers, and to the equalization of special assessments and the assessing of the cost of any public improvement. The statute does not contemplate that personal notice must be given to a class, such as voters or taxpayers in a political subdivision, on matters of general public concern, unless the member or members of the class are personally affected by the proceeding in a manner different from all the voters or taxpayers of the political subdivision, except as specifically provided by the statute. The changing of school district boundaries is a matter of policy which is purely legislative in character.

It does not involve matters of direct legal interest to the individual voters or taxpayers of a school district. We conclude that the voters or taxpayers of a school district do not have such a direct legal interest in the transfer of lands from one district to another as to require personal notice to each under the provisions of sections 25-520.01 to 25-520.04, R. S. Supp., 1957."

The plaintiff's real estate may be subject to assessment. This fact cannot be determined until a hearing is had on benefits, equalization, and assessment, after which time the plaintiff will know whether or not his real estate will be subject to the payment of special taxes.

It appears that the plaintiff would not have a direct legal interest in the resolution of necessity, considering the rule announced in the above-cited case.

As to whether or not the Farnam Press of Farnam, Nebraska, the newspaper in which the notice of hearing was published, is a legal newspaper or a newspaper of general circulation in Farnam, Nebraska, the plaintiff failed to raise any such question in his petition or amended petition. The following rule is applicable.

"An issue not presented in the trial court may not be raised for the first time in the Supreme Court." Freeman v. City of Neligh, *supra*.

We conclude that the board was not required by law to mail copies of the published legal notice of a public hearing on a proposed resolution of necessity for the creation of a sanitary sewer project to every party whose property might eventually become subject to assessment; that it is not the prerogative of courts to review or inquire into legislative acts of municipal boards concerning matters within their power, as to whether such municipal boards acted expediently, wisely, or necessarily; and that the plaintiff had an adequate remedy at law as indicated by the above-cited authorities.

In the light of the authorities heretofore set forth, and for the reasons given in this opinion, we conclude

that the trial court did not commit prejudicial error as contended for by the plaintiff. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE. V. GARRY C. MAY, APPELLANT.
119 N. W. 2d 307

Filed February 1, 1963. No. 35211.

1. **Criminal Law: Trial.** It is the duty of the court, upon request of the accused, to instruct the jury upon his theory of the case if there is any evidence to support it.
2. ———: ———. It is prejudicially erroneous not to give a tendered instruction embodying a correct proposition of law if such proposition is applicable to the facts and material to the defense.
3. **Intoxicating Liquors.** A person is under the influence of alcoholic liquor if such person is under the influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties.
4. **Criminal Law: Trial.** It is prejudicially erroneous to exclude impeaching testimony which would be of importance to the defense of an accused if a sufficient foundation is laid for impeachment.
5. **Juries: Witnesses.** In jury cases juries are the judges of credibility of witnesses and the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment.
6. **Criminal Law: Trial.** An instruction in a criminal case, the effect of which is to infringe upon the right of a jury as the judge of the credibility of witnesses and the weight to be given their testimony, is an invasion and an abridgment of a substantial right of the defendant.
7. **Witnesses: Trial.** The testimony of no witness is surrounded with such sanctity as to require it to be accepted by triers of fact as true in the absence of controversion by other witnesses or conflict with other testimony.

Appeal from the district court for Saline County: JOSEPH ACH, Judge. Reversed and remanded.

Jack L. Craven and Martin A. Cannon, for appellant.

Clarence A. H. Meyer, Attorney General, and Cecil S. Brubaker, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a criminal action in which the defendant, Garry C. May, is charged with the crime of motor vehicle homicide as defined by section 28-403.01, R. R. S. 1943. The defendant entered a plea of not guilty. The jury found the defendant guilty as charged, and he was sentenced to not less than 1 year and not more than 3 years in the Nebraska State Reformatory. Defendant has perfected an appeal to this court.

Section 28-403.01, R. R. S. 1943, provides that whoever shall cause the death of another without malice while engaged in the unlawful operation of a motor vehicle shall be deemed guilty of the crime of motor vehicle homicide. The information charged the defendant with causing the death of one Marvin Williams while engaged in the unlawful operation of a motor vehicle. The unlawful operation charged was that while under the influence of intoxicating liquor, defendant caused his motor vehicle to collide with the motor vehicle operated by Marvin Williams, hereinafter referred to as the deceased.

The collision occurred on State Highway No. 33, northeast of Crete, in Saline County, shortly after 2 p. m. on the afternoon of August 11, 1961. Defendant was driving a 1959 Oldsmobile toward Lincoln on highway No. 33. The deceased was driving a 1957 Ford toward Crete. Defendant was driving from the southwest toward the northeast. The deceased was driving from the northeast toward the southwest. For convenience, we will assume that the general direction of the road is east and west.

There is evidence from which the jury could find that approximately a mile east of Crete the defendant passed a car driven by one Harold Downey traveling in the same direction. As he passed Downey, defendant cut in sharply, causing Downey to hit his brake to slow down. The defendant's car then swerved off the paved portion of the highway onto the right shoulder. The car then swerved back and forth several times, going across the middle of the pavement. Two cars coming from the east passed the defendant's car safely, although one of them went off the pavement to do so. When the defendant's car was about a quarter of a mile in front of the Downey car, its occupants observed the Ford operated by the deceased come around a bend in the highway on its own side of the highway. Defendant's car then swerved across into the left lane and swerved back at the same moment that the Ford swerved, and they appeared to meet in the middle or a little over to the right side of the highway. The deceased died of the injuries received.

One of the members of the Crete rescue squad testified to smelling a very strong odor of some kind of alcoholic beverage on defendant's breath when defendant was placed on a stretcher at the scene of the collision. He testified further that defendant's trousers were wet in the crotch area and that the front seat of the car was wet; that the defendant was belligerent and wanted to know where his buddies were; and further, that defendant thought that he was still in Wilber.

Another witness testified defendant's face was flushed; that defendant denied driving the car; and that defendant admitted having four or five beers. The state highway patrol officer who investigated the collision testified in detail about defendant's conduct at the hospital and gave as his opinion that the defendant was under the influence of alcoholic liquor.

There is evidence clearly sufficient to justify a finding that the defendant was operating a motor vehicle

while under the influence of alcoholic liquor and further that while so engaged he collided with the Williams' motor vehicle, causing the death of Marvin Williams. Defendant sets out 13 assignments of error. Some of them are not properly presented. Others are without merit. We discuss herein only the four we believe merit consideration as being prejudicial to the rights of the defendant.

Defendant's defense was predicated on the theory that the collision took place entirely on his side of the highway, and that the automobile of the deceased suddenly swerved into his automobile. To substantiate this theory the defendant produced photographs, taken by a photographer for the Crete News at the scene of the collision, which purported to show marks of the Ford from its own lane of travel directly across the centerline toward the south edge of the highway and the rear of the Ford. None of the State's witnesses observed these marks, but they are clearly apparent in the photographs. There were two fresh gouge marks, one of which the patrolman testified was 10 to 12 inches long, near the extreme south edge of the highway. There was also dirt shown on the photograph in the eastbound lane, or the defendant's lane, which could have been from the collision and could have indicated the approximate point of the impact. This debris was at the extreme south edge of the pavement. The photographs and the testimony also indicated that the major damage to the defendant's Oldsmobile was to the left front, and to the deceased's Ford was to the right front. The cars ended up on the south side of the pavement. All but 2 feet of the Ford was off the pavement facing south. The Oldsmobile was south of and 6 inches in front of the Ford.

On this state of the record, the defendant tendered as his instruction No. 8 the following: "You are instructed that the states (sic) of the State of Nebraska provide, in substance, as follows: 'That a driver of a vehicle

upon a highway of sufficient width shall drive the same upon the right half of the highway, unless it is impracticable to drive on such side of the highway, except when overtaking and passing another vehicle and drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible.' " This tendered instruction was refused, and was not covered in any other instruction. It is a proper statement of the law, and there were physical facts from which the jury could have found that the impact occurred because the deceased was on the wrong side of the highway and not because of any unlawful driving on the part of the defendant. It is the duty of the court, upon request of the accused, to instruct the jury upon his theory of the case if there is any evidence to support it. Franz v. State, 156 Neb. 587, 57 N. W. 2d 139. The State argues that the tendered instruction was not complete enough to have any value. Our answer is that the tendered instruction sufficiently suggested an area of defense which should have been covered in the instructions under the evidence in the case. It is prejudicially erroneous not to give a tendered instruction embodying a correct proposition of law if such proposition is applicable to the facts and material to the defense. See Nelsen v. State, 159 Neb. 663, 68 N. W. 2d 194.

The defendant assigns as error the giving of instruction No. 4, which is as follows: "You are instructed that a person is 'under the influence of alcoholic liquor' if such person is under the influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties, *and the amount of alcoholic liquor consumed by the person is wholly immaterial.*" (Italics supplied.) The portion of the instruction criticized is the part italicized. The rest of the instruction has heretofore been approved by this court. See Uldrich v. State, 162 Neb. 746, 77

N. W. 2d 305. In this instruction, we are concerned with proof of a condition, "under the influence of intoxicating liquor." Certainly the amount and the kind of liquor consumed would at least be a circumstance to be considered in determining that condition. We cannot say that it would be wholly immaterial.

Defendant assigns as error the sustaining of the State's objection to the evidence of a reporter who interviewed the State's main witness at the scene of the collision. The cross-examination of this witness was as follows: "Q Mr. Downey, did you talk to other people after this accident around the scene of the accident? A I suppose I did. Q Do you recall talking to a young girl carrying a large newspaper camera, not a large camera but with a flash? A She was the one I said, 'I suppose I should stay here,' and she said, 'Yes, you should until the Patrol get here.' Q My question was, to keep the record straight, did you talk to this woman? A Not to any length at all. She was taking pictures. I saw that. Q Did she ask you anything about this accident as an interview as a reporter? A Not that I can recall. Q Do you recollect telling anybody you were approximately three-quarters of a mile away from this accident when the collision took place? A No; we were three-quarters or more when he went around us but not when the accident took place. Q Do you recall telling anybody after the accident that the collision took place in its entirety in the deceased victim's lane of traffic? A I don't think I did. I think it happened right in the middle of the highway."

The defendant produced the reporter identified in the cross-examination, and the following transpired: "Q On that particular day, Mrs. Buffum, did you talk to people out there? A Yes; I did. Q And on that particular day, was anybody particular person singled out to you or pointed out to you as a witness to this accident? A Yes; they did. Q Is that person at this time in this courtroom? A Yes; he is. Q And would

you please point him out? A The man on the far left in the front row on my left. MR. CRAVEN: Now let the record show that the witness is pointing to Harold Downey, a witness for the state. Q (By Mr. Craven) Now, Mrs. Buffum, to the best of your recollection, did he describe to you the accident as he recalled it shortly thereafter? MR. BARTOS: Just a minute. To that we object as incompetent, irrelevant and immaterial and calling for hearsay. THE COURT: Sustained. Q (By Mr. Craven) Mrs. Buffum, did you talk to Mr. Downey? A Yes I did. Q And what was the conversation? MR. BARTOS: The same objection, if the court please, as calling for hearsay. THE COURT: The same ruling. Sustained. * * * Q (By Mr. Craven) Do you remember anything that you asked him, the words and such, or approximately? A I just ask him, I believe I just ask him what happened in his estimation. Q You ask him what happened in his estimation and did he respond? A Yes. MR. BARTOS: Just a minute. We object to all of this as incompetent, irrelevant and immaterial; no sufficient foundation laid; calling for hearsay. THE COURT: Sustained."

As we view the record, a sufficient foundation was laid for the impeachment of the State's witness if proper questions restricted to the impeachment testimony had been asked of the impeaching witness. If objections were sustained to proper questions, then an offer of proof would be necessary. The questions asked of the impeaching witness were not in proper form and no offer of proof was made, so the assignment of error is without merit.

Defendant assigns as error the giving of instruction No. 17 which is as follows: "You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witnesses is entitled to receive, you should take into consideration their interest in the result of the suit, if any; their conduct and de-

meanor while testifying; their apparent fairness or bias or relationship to the parties, if any such appears; their opportunity for seeing or knowing the things about which they have testified; their ability to remember and relate accurately the occurrences referred to in their evidence; the extent to which they are corroborated, if any at all, by circumstances or the testimony of credible witnesses; the reasonableness or unreasonableness of their statements; and all other evidence, facts and circumstances proved tending to corroborate or contradict such witnesses. *Insofar as there may be any conflict in the evidence it is your duty to reconcile it if you can; if you cannot, then to determine which is true and which is untrue, and give such weight to the testimony of any witness as in your judgment it should have under all the circumstances of the case.*" (Italics supplied.) The defendant complains that the portion of the instruction italicized requires the jury to accept the testimony of all witnesses if there is no conflict in the evidence. We held in Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880: "In jury cases juries are the judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment."

In Frank v. State, 150 Neb. 745, 35 N. W. 2d 816, we reiterated the rule that: " 'An instruction in a criminal case the effect of which is to infringe upon the right of a jury as the judge of the credibility of witnesses and the weight to be given their testimony is an invasion and an abridgement of a substantial right of the defendant.' "

The effect of instruction No. 17 is to tell the jurors that it was their duty to reconcile any conflict in the evidence, and is merely another way of saying that they could not reject evidence unless they found it irreconcilable with other testimony which they found to be true, which was the situation in Wilson v. State, *supra*.

As this court said in that case: "The testimony of no witness * * * is surrounded with such sanctity as to require it to be accepted by triers of fact as true in the absence of controversion by other witnesses or conflict with other testimony."

For the reasons given, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SIMMONS, C. J., not participating.

ESTHER HINER, APPELLANT, V. JERRY NELSON, APPELLEE.
119 N. W. 2d 288

Filed February 1, 1963. No. 35239.

1. **Trial.** Instructions to a jury should be considered as a whole and if they fairly submit the case that is all the law requires.
2. ———. The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear.
3. ———. Where the meaning of an instruction is clear and a correct statement of the law, error cannot be predicated on the selection of words.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Ross & O'Connor and Thomas F. Carl, for appellant.

Fraser, Stryker, Marshall & Veach, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This action was brought by the plaintiff and appellant Esther Hiner against the defendant and appellee Jerry Nelson, in the district court for Douglas County, Nebraska. Its object was to recover damages for personal injuries sustained by plaintiff, a pedestrian, as she was

struck by an automobile driven by the defendant in Omaha, Nebraska.

Trial to a jury resulted in a verdict and judgment for defendant. On the plaintiff's motion for new trial being overruled, she has brought the cause to this court on appeal.

The trial court submitted to the jury the issue of the defendant's negligence and the plaintiff's contributory negligence. The plaintiff assigns no error in submitting the issue of contributory negligence, but does assign error in the instructions by which it was submitted.

The plaintiff assigns error in the giving of instructions Nos. 4, 5, and 13 by the court on its own motion; that the court erred generally in failing to instruct the jury with respect to the plaintiff's theory of the case; that its instructions mentioned gave undue prominence to defendant's contention of contributory negligence and were confusing and misleading to the jury; and that it failed to define the phrase "preponderance of the evidence."

After stating that the dispute was concerning a collision between the automobile operated by defendant in a southerly direction on Twenty-seventh Street and plaintiff walking in a westerly direction across Twenty-seventh Street in or south of the crosswalk located on the south side of Leavenworth Street, the court gave its instructions Nos. 3 and 4, which must be considered together that instruction No. 4 be understood. They are set out as follows: "No. 3. Principal disputed factual contentions of the parties are: Contention A: On the occasion in suit defendant was negligent in one or more of the following respects: (1) In failing to have his automobile under reasonable control. (2) In driving his automobile at a high and unreasonable speed. (3) In failing to sound any warning. (4) In failing to keep a proper lookout. Contention B: On the occasion in suit plaintiff was negligent. Contention C: Such negligence of defendant was a proximate cause of harm to

plaintiff. Contention D: Negligence of plaintiff was a proximate cause of harm to herself. Contention E: The nature and extent of such harm to plaintiff is established. The foregoing statement is not to be considered by the jury as evidence in this case, but as principal disputed factual contentions of the parties.

"No. 4. If you find that all of Contentions A, C, and E of instruction No. 3 have been proved by a preponderance of evidence, your verdict will be for plaintiff unless you find that both of Contentions B and D of Instruction No. 3 have been proved by a preponderance of evidence and you further find upon a comparison of any such negligence of the parties in accordance with instruction No. 13 that plaintiff is not entitled to recover. If any one, or more than one, of Contentions A, C, and E of Instruction No. 3 have not been so proved, your verdict will be for defendant."

Contention A in instruction No. 3 includes in the alternative the four specifications of negligence set out therein. The two instructions make it clear that the jury need only find one or more of the several items of negligence mentioned in contention A to be so proved. Instruction No. 4 refers to contention A as a whole and not to the four specifications set out therein. Thereafter if the jury found under contention C that any such negligence was the proximate cause of the plaintiff's injury or "harm," as it was termed therein, and that such "harm" to the plaintiff was established, as set out in contention E, its verdict should be for the plaintiff unless it also should find that the plaintiff was negligent as stated in contention B and that such negligence was a proximate cause of her injury or "harm" as set out in contention D. In considering each of these contentions the jury was told it must find them proved by a preponderance of the evidence.

We think these two instructions properly set out what the jury must find to entitle recovery by the plaintiff. It further provided that if all these conten-

tions A, C, and E were not so proved it should find for the defendant. It further provided that if the jury found the defendant was negligent resulting in harm to the plaintiff which was established but further found the plaintiff was negligent which was a proximate cause of her injuries also, it should compare such negligence of the parties, as provided in instruction No. 13, which reads as follows: "If you find that all contentions of instruction No. 3 have been proved by a preponderance of evidence, you will then proceed to compare the negligence of the parties as stated in Contentions A, B, C, and D of instruction No. 3. Upon such comparison you may find the degrees of negligence to be as indicated on one of the horizontal lines in the chart in this instruction, and your verdict will then be the verdict stated on the horizontal line expressing your finding.

C H A R T

'MS' means 'more than slight'
'LG' means 'less than gross'

Degree of Plaintiff's Negligence	Degree of Defendant's Negligence	Verdict for
Slight	Gross	Plaintiff
Slight	LG	Defendant
MS	Gross	Defendant
MS	LG	Defendant

"If you find for plaintiff you will deduct from the whole amount of harm experienced by her such proportion thereof as her negligence bears to the entire negligence in the case as shown by the evidence and return a verdict for the balance only."

By this instruction No. 13 the jury is again told to compare the negligence of the parties. It is then given the table above set out with the instruction that "MS" means "more than slight" and "LG" means "less than gross" and the table sets out for whom its verdict should be after comparing the negligence of the parties in ac-

cordance with what its findings should be as shown on the chart.

The plaintiff objects to this instruction. Her counsel urge that the chart over-emphasizes the defendant's contention; and that it in effect directs the jury to return a verdict for the plaintiff on its findings in only one of four instances and a verdict for the defendant in the other three. This of course is true, but it nevertheless follows the law as set out in our comparative negligence statute. § 25-1151, R. R. S. 1943.

This court has repeatedly approved, and still approves, the instruction in regard to comparative negligence set out in Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158. That instruction is as follows: "If * * * plaintiff is found to be guilty of negligence directly contributing to the injury complained of, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which, under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff, however slight, will defeat a recovery. And even when plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of damage sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained." See, also, Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704; Emel v. Standard Oil Co., 117 Neb. 418, 220 N. W. 685; and many other cases. All the courts and lawyers of this state are familiar with it. It doubtless would be preferred by those who are well versed in our practice. It has become a standard instruction in this state. Yet we cannot say that instruction No. 13 does not properly set out the

law. A juror in properly considering the usual instruction taken from Morrison v. Scotts Bluff County, *supra*, should have all four of these situations in his mind. The jury should nevertheless find for the defendant in the same three instances set out in instruction No. 13 in this case and should find for the plaintiff only in the one instance, and then only after diminishing the verdict in proportion to the negligence of the parties. This court cannot say that the minds of jurors would be confused to the extent of preventing them from returning a fair and impartial verdict under the instructions as given on the law of negligence and comparative negligence. The plaintiff contends the instructions are complicated and confusing. This to a layman's mind might be true under the instruction usually given. It must be remembered the jurors are not familiar with legal usage and the comparative negligence law itself is complicated, and an instruction in either instance must also be somewhat complicated.

Plaintiff also complains that the jurors must turn from one instruction to another and that they would be confused. She contends instructions Nos. 3, 4, and 13 should have been placed close together in order that they be better understood. This situation also might exist in most instructions which in all cases are to be considered together. Instructions Nos. 3 and 4 are instructions relative to the issues of the negligence of the parties. It was necessary to use instruction No. 13 only if the jury determined the negligence of both parties had been to some extent the cause of the injury. Under the circumstances we cannot say the separation of these instructions was prejudicial.

We will now set out the rules which we think must govern our decision herein.

"Instructions to a jury should be considered as a whole and if they fairly submit the case that is all the law requires." Bryant v. Greene, 166 Neb. 520, 89 N. W. 2d 579.

"The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear." Brown v. Hyslop, 153 Neb. 669, 45 N. W. 2d 743.

"Where the meaning of an instruction is clear and a correct statement of the law, error cannot be predicated on the selection of words." Oliver v. Nelson, 128 Neb. 160, 258 N. W. 69.

Plaintiff complains of the court's failure to properly define the words "preponderance of the evidence." Its instruction No. 5 reads as follows: "No. 5. The burden is upon a party maintaining a contention of instruction No. 3 to prove same by a preponderance of evidence. A contention is so proved if, but only if:

"(a) You consider fully and fairly all evidence in the case, and (b) From such consideration your persuasion of truth of the contention is stronger than your persuasion of its falsity.

"If your persuasion of falsity of the contention is stronger, if you have no persuasion of truth or falsity, or if your persuasions of truth and falsity are evenly balanced, the contention is not proved by a preponderance of evidence."

We think this instruction sufficiently sets out what the court meant by preponderance of the evidence; that all of the instructions state the law correctly; and that this court cannot say that they were confusing to the jury or that the phraseology, though not that usually current in usage, would confuse the jury. It follows that the errors assigned by the plaintiff cannot be sustained and the judgment of the trial court must be affirmed.

AFFIRMED.

SIMMONS, C. J., not participating.

STANLEY KASPAREK ET AL., APPELLANTS, V. GEORGE E. MAY ET AL., APPELLEES.
119 N. W. 2d 512

Filed February 1, 1963. No. 35279.

1. **Contempt.** A civil contempt action is concerned only with compliance with the judgment on the issues as they existed in the action which resulted in the judgment.
2. ———. Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a civil contempt.
3. ———. A civil contempt has for its purpose the preservation and enforcement of the rights of private parties to suits, and to compel obedience to orders and judgments made to enforce private rights to which the court has found them to be entitled. Such a contempt is remedial and coercive in its nature, and affects the parties whose private rights and remedies are involved.
4. ———. Proceedings in contempt are governed by the rules applicable to prosecutions by indictment, are in their nature criminal, and no intendments will be indulged in to sustain a conviction. It is necessary to establish guilt beyond a reasonable doubt.
5. **Injunctions: Contempt.** The disobedience of an injunction must be willful before the breach thereof may be punished as a contempt.
6. **Contempt.** Indemnity for damages cannot be secured in a contempt proceeding.
7. **Contempt: Courts.** The power to punish for contempt is an essential attribute of a court of general jurisdiction.
8. **Contempt: Costs.** Costs and expenses incurred by an injured party may be recovered in the contempt proceedings from the contemner.

Appeal from the district court for Jefferson County: ERNEST A. HUBKA, Judge. Reversed and remanded with directions.

McCown & Baumfalk, for appellants.

Denney & Denney and W. O. Baldwin, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a civil contempt proceeding brought by Stan-

ley Kasparek and Emma Kasparek against George E. May and Rose M. May for the violation of a judgment entered by the district court for Jefferson County on June 8, 1956. This judgment will be hereinafter referred to as the 1956 decree. The trial court found the Mays to be in contempt, but held the contempt was not willful or contumacious. The court further interpreted the judgment, which provided for the removal of a dike to the natural ground level, to mean that the dike should be removed to a ground level of 82 feet. The court also held that a ditch constructed pursuant to the judgment was sufficient and that each party should pay his own costs. Previous to the hearing, the court had sustained a motion to strike all reference to damages and expenses from the accusation. The Kaspareks prosecuted an appeal to this court.

For convenience, Stanley Kasparek and Emma Kasparek, plaintiffs and appellants, who are the joint owners of approximately 158 acres in the north half of the southeast quarter and the south half of the northeast quarter of Section 26, Township 2 North, Range 2 East of the 6th P. M., in Jefferson County, and George E. May and Rose M. May, defendants and appellees, who are the joint owners of the southwest quarter of Section 25, Township 2 North, Range 2 East of the 6th P. M., in Jefferson County, except for 6 acres, will be referred to hereinafter as Kasparek and May respectively. The only connection of the respective spouses with this action, unless otherwise specifically stated, is as joint owners. The east section line of the north half of the southeast quarter of Section 26 is the west section line of the north half of the southwest quarter of Section 25.

The portion of the 1956 decree involved in this proceeding is the following: "IT IS THEREFORE BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the dike as shown on plaintiffs' Exhibit No. 40 in this said action, constructed by the defendants George E. May and Rose M. May in the year 1949 upon

the Southwest Quarter of Section 25, Township 2 North, Range 2 East, Jefferson County, Nebraska, lies in its entirety in and obstructs the natural flood channel of the Little Blue River, and said defendants, and each of them, be and they hereby are permanently enjoined from maintaining said dike and that within five (5) months from this date the said defendants shall cause said dike to be removed from their land, in its entirety, or, in the alternative and within the said time said defendants shall cause to be removed all of said dike from a point in said dike opposite the point where the watercourses from the south merge and join together near said dike, as shown on plaintiffs' Exhibit No. 40, on to the north and east of said point, the latter alternative to be available to the defendants only on the condition that the defendants shall, within the said time, construct, and thereafter maintain (CBE) on their own land a ditch or drain from the point of merger of the watercourses above referred to on to the Little Blue River sufficient to carry the water from the flow of said watercourses into said river.

"IT IS FURTHER BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that when said dike is removed pursuant to this decree the land shall be restored as nearly as possible to its natural elevation and contour as it was before the construction of said dike with the exception of the area of the ditch or drain to be constructed in the event that the defendants elect to remove only a part of said dike as provided in the alternative set forth; that in the event the defendants elect to remove only a part of said dike as provided in the alternative set forth, and to construct the ditch or drain then required to be constructed, the waste dirt, if any, resulting from the construction of said ditch or drain shall not be piled so as to raise a mound or ridge more than two (2) feet above the natural level of the ground immediately adjacent to said mound or ridge."

May accepted the alternative provided in the 1956 decree, and employed consulting engineers to stake out the land to comply with the court's order. He then employed a contractor who did the work suggested by the consulting engineers within the 5-month limitation. This construction work was done with a bulldozer with a 10-inch blade. The contractor started the removal of the dike at the point immediately east of the southeast corner of the Kasparek land. The dike was lowered by pushing the dirt to either side of the blade.

In October 1956, a survey, made at the request of May, disclosed that a fence which supposedly separated the north half of the southeast quarter, owned by Kasparek, and the north half of the southwest quarter, owned by May, was approximately 55 feet east of the section line at the southeast corner of the Kasparek property, and curved to the northeast so that it varied in distance east of the section line from 55 feet at the southeast corner to 310 feet at the river bank due east of the northeast corner. These distances are indicated on exhibit 107, an exhibit prepared by Kasparek's surveyor. The drainage ditch provided for in the alternative was constructed through a portion of this area.

Kasparek claims the ownership of the land in the north half of the southwest quarter of Section 25 west of the fence line as it existed at the time of the 1956 decree by adverse possession. We make no determination on this point. If Kasparek has such claim, it is by virtue of acts which ripened after the filing of the original action. There is no question the drainage ditch was constructed in the southwest quarter of Section 25, Township 2 North, Range 2 East of the 6th P. M., in Jefferson County, Nebraska, and that May is the record title owner thereof. The question as to whether or not Kasparek has acquired any portion of this property by adverse possession is not properly triable in a civil contempt action. We are concerned herein only with compliance with the 1956 decree on the issues as they ex-

isted in the action which resulted in the 1956 decree. The ownership of this land was not and could not have been an issue involved in the 1956 decree.

The following general principles of law governing contempt proceedings are applicable herein: "Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a civil contempt." McFarland v. State, 165 Neb. 487, 86 N. W. 2d 182.

"Contempts instituted to preserve and enforce the rights of private parties to a suit and compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them entitled, are civil contempts which may be prosecuted in the original action by the affidavit of any party therein who is injuriously affected." Leeman v. Vocelka, 149 Neb. 702, 32 N. W. 2d 274.

"A civil contempt has for its purpose the preservation and enforcement of the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce private rights to which the court has found them to be entitled. Such a contempt is remedial and coercive in its nature, and affects the parties whose private rights and remedies are involved." McFarland v. State, *supra*.

"Proceedings in contempt are governed by the rules applicable to prosecutions by indictment, are in their nature criminal, and no intendments will be indulged in to sustain a conviction. It is necessary to establish guilt beyond a reasonable doubt." Whipple v. Nelson, 138 Neb. 514, 293 N. W. 382.

Has May complied with the alternative provided in the 1956 decree? This alternative required the removal of the dike from a point opposite the place where the two watercourses from the south merged. In this proceeding, May testified that this point is at the southeast corner of the Kasparek land. It was at the southeast

corner that the removal of the dike was started. Kasparek testified the point of merger is 150 to 200 feet south of the southeast corner. We call attention to the fact that the 1956 decree specifically provided that the point of merger to be considered was the point as shown on exhibit 40, which is exhibit 1 in this proceeding. It is very evident from a study of exhibit 1 that the point of merger is from 150 to 175 feet south of the southeast corner, and any other determination would require a modification of the 1956 decree. After the adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to modify the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Rose v. Vonderfecht, 167 Neb. 276, 92 N. W. 2d 691. The surveyor who made the measurements for exhibit 1 testified that the point of merger was approximately 150 feet south of the southeast corner of the Kasparek property, and we accept this figure. It is undisputed that no attempt of any nature was made to remove this 150 feet of the dike directly south of the southeast corner of the Kasparek land.

Another point of contention herein is that the portion of the dike actually removed has not been removed in accordance with the provisions of the 1956 decree. The 1956 decree specifically provided that when the dike was removed, the land should be restored as nearly as possible to its elevation and contour as it existed before the construction of the dike. There is no evidence in this record as to the exact elevation of the land on which the dike was erected, and we do not have the evidence in the original proceeding. The evidence we do have, other than the testimony of the parties, which is very unsatisfactory, is that which may be deduced from the exhibits in this record, particularly exhibits 1 and 100. We are satisfied that the dike has not been removed to the natural level of the ground before its construction, as required by the 1956 decree. We will

cover this point more specifically hereinafter. We also observe that the method employed in its removal had the effect of raising the level of the land east and west of the dike. The evidence is conclusive that a dike still exists over the area except for a span of 150 feet which was taken out by a flood in 1957. A reasonable interpretation of the record would place the present height of the dike at from 2 to 4 feet. Kasparek testified that the dike was approximately 4 feet in height but that an additional 8 to 10 inches had been added by the plowing of a "back furrow" through the area.

It may be argued that the 1956 decree permits a 2-foot mound. It does, but not at the site of the dike. The decree requires the dike to be removed in its entirety and the land restored to its natural contour and elevation. The 2-foot mound referred to in the 1956 decree is limited specifically to the waste dirt from the ditch to be piled adjacent thereto. It has no reference whatever to the dirt to be removed from the dike.

Kasparek assigns as error the determination by the trial court that the 1956 decree should be interpreted to provide that the dike should be removed and reduced to a ground level of not over 82 feet, in accordance with the calculations of engineering as described and set forth in exhibit 1. The figures in exhibit 1 were determined with reference to a base point of 100 at the highway bridge over the Little Blue River to the northeast of this property. We are unable to determine how the trial court arrived at a figure of 82 feet. We cannot substantiate it from the record.

Exhibit 100 is a profile on the May land east of the dike from the southernmost point through point "Z" which is the center of the north portion of the dike along the river on the May property. It purports to give the natural ground level on the May property over an area of 1,500 feet. Starting at a point due east of the southeast corner and proceeding north the natural ground level does not exceed 80.5 feet, and gradually

drops to 78 feet. The ground area directly east of the dike marked on exhibit 1 does not exceed 80.3 feet, and the marked area west of the dike does not exceed 80.5 feet.

There are cross sections shown on exhibit 1 to give the height of the dike at those selected points. The surveyor who made the measurements for exhibit 1 testified that these cross sections were taken across the dike from points on both sides of the dike, out far enough to reach the natural ground level. The highest point of the natural ground level shown on the cross section north of the southeast corner of the Kasparek property was 81 feet. This was at a point 50 feet due east of the dike and east of the southeast corner. All of the other cross sections on the May land north of this point ranged down from 78.8 feet to 77.1 feet. We note also that it is undisputed that prior to 1949, when the dike was constructed, the May land would flood before the Kasparek land through a flood channel of approximately 650 feet, starting 100 feet north of the southeast corner. We find that an interpretation of the 1956 decree to provide for a reduction of the dike to a ground level of not over 80.5 feet rather than 82 feet would more nearly reflect what that decree was intended to accomplish.

Kasparek assigns as error the finding of the trial court that the drainage ditch was constructed on May's premises and was sufficient. We determine that the drainage ditch was constructed on the southwest quarter of Section 25, Township 2 North, Range 2 East of the 6th P.M., in Jefferson County, Nebraska, in accordance with the 1956 decree, without any reference to any determination of the question of ownership of the area by virtue of adverse possession, which is not at issue in this case. We determine that the construction of the ditch itself was sufficient for the purpose intended. With specific reference to the 150 feet between the point of merger of the watercourses from the south and the southeast corner of the Kasparek land the evi-

dence is not too definite. The 1956 decree requires that the ditch be constructed from the point of merger of the watercourses, which we have determined to be 150 feet south of the southeast corner of the Kasparek land.

Kasparek also assigns as error the failure of the trial court to find that May has not maintained the ditch after its construction. The evidence is undisputed that there has been no maintenance since 1957, and that at least 500 feet of the ditch north from the southeast corner of the Kasparek land has been permitted to fill with silt. Proper maintenance requires the removal of all silt and debris. The lowering of the dike will require the proper maintenance of the ditch, and May has that obligation. This maintenance is to be without interference from Kasparek, unless and until in a proper action a court should determine the rights of the parties to be otherwise than they are assumed to be for the interpretation of the 1956 decree.

Kasparek assigns as error the findings of the trial court that the contempt of May was not willful and contumacious. In Whipple v. Nelson, 138 Neb. 514, 293 N. W. 382, we said: "It follows that the disobedience of the injunction must be wilful before the breach thereof may be punished as a contempt." It is true that May sought professional advice in providing the ditch required. He also employed a contractor to do the actual work in removing the dike and providing the ditch. The 1956 decree required the performance of specific acts. The 1956 decree was definite, and, while it did not give exact measurements, the obvious intention is readily apparent. May did not relieve himself of responsibility for compliance with the 1956 decree by contracting the work to others. If there was any question as to what the 1956 decree meant, it was possible for May to have secured a judicial interpretation of the decree. When there is a question as to what a court intends by its order, and one acts on his own interpretation, he does so at his peril. As we view the evidence,

May did not remove the dike in accordance with the 1956 decree, nor did he reasonably approximate that result, and no satisfactory explanation is given for the failure to do so.

Kasparek assigns as error the action of the trial court in sustaining a motion to strike all allegations that had to do with damages and expenses from his accusation. The sustaining of the motion as to damages was proper. In some jurisdictions, a fine may be imposed for the indemnification of the person who has been damaged by the failure to perform. We are not in accord with these holdings, and state that indemnity for damages cannot be secured in a contempt proceeding. The 1956 decree assessed all damages involved in the original action. If Kasparek suffered further damages, his remedy is an action at law for the subsequent damage. Civil contempt is available to enforce the decree actually rendered, not to afford a remedy for the recovery of subsequent damage. However, a different rule is involved on the question of costs and expenses. Unless it were so, injured parties might be prevented from obtaining the enforcement of a judgment, because the cost thereof could be prohibitive.

We said in State ex rel. Beck v. Frontier Airlines, Inc., *ante* p. 172, 116 N. W. 2d 281: " '* * * it is the law in this state that the power to punish for contempt is an essential attribute of a court of general jurisdiction.' " It is just as essential to the maintenance of that right that the court be permitted to assess the cost of its procurement. We hold that costs and expenses incurred by an injured party may be recovered in the contempt proceedings from the contemner.

Because the burden was on May to fully conform to the 1956 decree, and it is evident he has not done so, we find the evidence sufficient to justify a finding of willful contempt. We do, however, take into consideration the mitigating circumstances disclosed by the record.

For the reasons given, we reverse the judgment of the trial court in the portions noted above and remand the cause, tax all the costs in this proceeding to the appellees May, including an attorneys' fee of $250 for Kasparek's attorneys, and direct that May purge himself of contempt within 90 days from the filing of the mandate herein by performing the following acts:

1. Reduce and lower all of the dike north and east from a point 150 feet south of the southeast corner of Section 26, Township 2 North, Range 2 East of the 6th P.M., in Jefferson County, Nebraska, to a ground level of not to exceed 80.5 feet, in accordance with calculations of engineering as described and set forth in exhibit 1.

2. Restore the drainage ditch to its condition at the time of its original construction, but extend it back to the point of merger of the two watercourses from the south, which has been determined to be 150 feet south of the southeast corner of Section 26, Township 2 North, Range 2 East of the 6th P.M., in Jefferson County, Nebraska.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., not participating.

RAYMOND HOLLAND, FOR THE BENEFIT OF AND IN BEHALF OF THE VILLAGE OF BROWNVILLE, NEMAHA COUNTY, NEBRASKA, APPELLANT, V. BROWNVILLE GRAIN COMPANY, A CORPORATION, ET AL., APPELLEES.

119 N. W. 2d 304

Filed February 1, 1963. No. 35313.

Municipal Corporations: Injunctions. A private person who seeks equity the effect of which is to restrain an act of a municipal body, in order to state a cause of action, must plead some special injury peculiar to himself aside from and independent of a general injury to the public unless it entails an illegal expenditure of public funds or involves an illegal increase in the burden of municipal taxation.

Appeal from the district court for Nemaha County: VIRGIL FALLOON, Judge. Affirmed.

Frederick W. Carstens, for appellant.

Kennedy, Holland, DeLacy & Svoboda, Clarence E. Heaney, Jr., and John Ferneau, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action entitled Raymond Holland, for the benefit of and in behalf of the Village of Brownville, Nemaha County, Nebraska, plaintiff, appellant herein, against Brownville Grain Company, a corporation, William Rogge, Village Board of the Village of Brownville, Nemaha County, Nebraska, Amelia C. Young, Victor Rowell, Roy Hood, Marvin Rebuck, Alfred Pebley, and the Village of Brownville, Nemaha County, Nebraska, defendants, appellees herein. The purpose of the action, as it is declared by the petition which was filed, was to have canceled, annulled, and set aside a lease which was entered into on or about April 1, 1961, by and between Brownville Grain Company and the Village of Brownville, to have declared nonexistent a right of entry to or possession of the area leased, and for an injunction preventing the Brownville Grain Company from interfering with use thereof by the public.

All of the defendants except William Rogge and Brownville Grain Company joined in a special demurrer to the petition. These two filed separate special demurrers.

A ground of all of the demurrers was generally that the plaintiff had no legal capacity to sue, and particularly that the plaintiff as a freeholder of the village was without legal standing or capacity to institute or prosecute the action.

Another ground was that the petition disclosed that there was a defect of parties, it being apparent that the

only real parties in interest were the Brownville Grain Company and the Village of Brownville.

Included with the special demurrers was a general one which asserted that the petition did not state facts sufficient to constitute a cause of action. These demurrers were sustained by a single order. The grounds therefor do not appear in the journal entry.

Thereafter an amended petition was filed. Special and general demurrers were filed to this petition attacking it, to the extent necessary to point out here, on the same grounds as were asserted against the original petition. These demurrers were sustained. The grounds on which they were sustained do not appear.

A second amended petition was filed. Demurrers of a character similar to the earlier demurrers were duly filed and, as in the earlier instances, they were sustained without statement of reason therefor. By the order and judgment of the court the action of the plaintiff was dismissed. Thereafter a motion for new trial was filed which was overruled. It is from this order overruling the motion for new trial and the judgment of dismissal that the plaintiff has appealed.

Four assignments of error are asserted in the brief as grounds for reversal of the judgment of the district court. By all of them it is contended that the court erred in sustaining the special demurrers which were interposed by the defendants.

By the first it is urged that the plaintiff did have legal capacity to sue.

By the second it is insisted that the special demurrer of the Brownville Grain Company was improperly sustained for the reason that this defendant was a contracting party to the lease which has been mentioned.

By the third it is insisted that the special demurrer of the other defendants should have been overruled for the reason that as a taxpayer the plaintiff had legal capacity to sue and to seek relief from these defendants.

The fourth assignment declares only that the sustain-

ing of the special demurrers was contrary to law.

There is no assignment by which it is asserted that the general demurrers which were asserted along with all of the special demurrers were improperly sustained.

The first of these assignments will be considered first herein. This of course requires analysis of the status of the plaintiff as declared by the petition or petitions. It is of course true that the legal capacity of the plaintiff to maintain the action as against demurrer must be sufficiently alleged.

As indicated this is an action to set aside and to have declared invalid a lease which is attached to and made a part of the petitions. The land is described in the lease by metes and bounds but no good purpose could be served by setting forth the description here. The petitions by their terms do not declare the specific location of the land. By recital the lease declares the location to be in the village of Brownville. Title to and ownership of the land are not declared. The only reference to title or ownership in the original petition is the following: "Plaintiff further alleges and states that the Village Board of Brownville, Nebraska, was not the owner of the premises which said Village Board attempted to lease to defendant Brownville Grain Company; * * *."

The reference to ownership in the amended petition was the following: "Plaintiff further alleges and states that he is bringing this action in good faith upon the representation that the Village Board of Brownville, Nebraska, is not the owner of the premises which are contained in this lease."

In the second amended petition the following appears: "Plaintiff further alleges and states that he is acting in good faith in bringing this action and is acting upon the representation made by the Village Board of Brownville, Nebraska that the Village of Brownville is the owner of the premises which are contained in this lease."

Turning now to the personal or individual rights of

the plaintiff in and to the land or its use, it is pointed out that in the first petition no claim was made.

The amended petition contains the following: "That plaintiff as a taxpayer, resident and citizen of the Village of Brownville, Nemaha County, Nebraska, has for years used the ground involved in this transaction for the purpose of gaining access to the Missouri River, * * * for himself, his family and for all taxpayers of the Village of Brownville; that being deprived of the use thereof, as he and all taxpayers of the Village of Brownville would be if this lease were to remain in force, would constitute an injury to him and to them." This was substantially repeated in the second amended petition.

No other kind or character of right in favor of the plaintiff is declared by the plaintiff in his various pleadings. It is observable that no right of ownership acquired by purchase, adverse possession, or use of this real estate is declared by the pleadings to be in the Village of Brownville or the plaintiff.

As to the Village of Brownville, the allegations of the petitions do not declare that the lease entails any illegal expenditure of public funds or that it involves in anywise an increase in the burden of municipal taxation. To the extent mentioned therein the following from the lease negatives the existence of a burden imposed on the Village of Brownville: "Lessor makes no warranties of any kind or nature whatsoever of its title to the said leased premises and any and all expenses necessary or incident to the sufficiency of the title of Lessor thereto, or to the defense against any claims of other parties to said real estate, * * *, shall be the responsibility of, and shall be assumed, borne and paid by Lessee."

Before it may be said that a plaintiff has stated a cause of action which is not vulnerable to demurrer, his petition must conform to the following exactions: "One seeking equity to restrain an act of a municipal

body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it entails an illegal expenditure of public funds or involves an illegal increase in the burden of municipal taxation." Martin v. City of Lincoln, 155 Neb. 845, 53 N. W. 2d 923. See, also, Chizek v. City of Omaha, 126 Neb. 333, 253 N. W. 441; Kirby v. Omaha Bridge Commission, 127 Neb. 382, 255 N. W. 776.

It is clear from what has been said that the petitions of the plaintiff fail to contain any pleaded facts which amount to a special injury peculiar to himself, and further the petitions do not plead any injury to the public which would involve illegal expenditure of public funds or increase the burden of municipal taxation. For this reason a discussion of the other assignments of error is not deemed necessary.

The judgment of the district court sustaining the demurrers and dismissing the action is affirmed.

AFFIRMED.

MIDWEST LAUNDRY EQUIPMENT CORPORATION, A CORPORATION, APPELLEE, V. MAURICE BERG ET AL., APPELLANTS.
119 N. W. 2d 509

Filed February 1, 1963. No. 35349.

1. **Courts.** The journal of the district court is the official record of the judgments and orders of that court.
2. **Pleading.** An amended pleading supersedes the original pleading, and thereafter the original pleading ceases to perform any office as a pleading.
3. ———. An answer may include a counterclaim when the counterclaim arises out of the contract or transaction which is the subject of the action or is connected with the subject of the action.
4. **Fraud.** One who has been induced by fraud to enter into a contract may affirm the contract and maintain an action to recover the damages he has sustained or may set up such damages by way of defense or counterclaim.

5. **Pleading.** The adjustment of defendant's demands by cross-claim in plaintiff's action rather than by independent suit is favored and encouraged by law.
6. **Parties.** When the determination of a controversy cannot be had without the presence of a new party to the suit, the court may order the new party to be brought into the suit.
7. ———. When a new party is necessary to the determination of a counterclaim, the court may order the new party to be brought into the action or direct that the counterclaim be made the subject of a separate action.

Appeal from the district court for Madison County: GEORGE DITTRICK, Judge. Reversed and remanded.

Ginsburg, Rosenberg & Ginsburg, Norman Krivosha, and Thomas E. Brogan, for appellants.

Young, Denenberg & Mullery and Moyer & Moyer, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an appeal from an order of the district court overruling the defendants' motion to join an additional party as a defendant and an order dismissing the cross-petition of the defendants.

The amended petition alleged that the defendants, Maurice Berg and June Berg, entered into a written contract to purchase equipment from the plaintiff, Midwest Laundry Equipment Corporation, to be used in the operation of a coin-operated laundry; that the plaintiff had advanced $7,346.57 to the defendants by the payment of rent upon the property in which the laundry was to be operated, the expense of remodeling the rented property, and the first installment payment due under the contract; and that the defendants had agreed to reimburse the plaintiff for the amounts that had been advanced. A copy of the contract was attached to and made a part of the petition.

The defendants filed an answer and a cross-petition.

The plaintiff moved to strike the answer for the reason that it was not properly verified. The defendants then filed an amended answer and cross-petition and a motion to join Industrial Credit Company as an additional party defendant. The motion alleged that the contract for the purchase of the laundry equipment was held by Industrial Credit Company. The plaintiff moved to dismiss or strike the cross-petition for the reason that its subject matter did not pertain to or directly relate to the indebtedness alleged in the petition. The trial court overruled the motion to join the additional party defendant and dismissed the cross-petition but granted the defendants 10 days in which to plead further. The entry made in the trial docket at that time indicates that the trial court intended to sustain the motion to strike rather than dismiss the cross-petition. However, the entry in the journal is controlling and it recites that the cross-petition was dismissed. See, § 25-1318, R. R. S. 1943; Hornick, Hess & Moore v. Maguire, 47 Neb. 826, 66 N. W. 867.

The defendants filed a motion for new trial. The plaintiff moved to strike the motion for new trial. At the hearing upon the motion for new trial the plaintiff withdrew its objections to the sufficiency of the verification of the original answer and cross-petition. The trial court overruled the motion to strike the original answer and cross-petition, sustained the motion for new trial as to the original answer and cross-petition, and overruled the motion for new trial as to the order dismissing the cross-petition contained in the amended answer and cross-petition. The defendants then appealed to this court.

The assignments of error are that the trial court erred in overruling the motion to join an additional party defendant, and in dismissing the cross-petition.

At the time the motion for new trial was heard, an amended answer and cross-petition had been filed. An amended pleading supersedes the original pleading, and

thereafter the original pleading ceases to perform any office as a pleading. Woodworth v. Thompson, 44 Neb. 311, 62 N. W. 450; Smith v. Wigton & Whitham, 35 Neb. 460, 53 N. W. 374. Thus, the effect of the order of the trial court upon the motion for new trial was to leave the order dismissing the cross-petition in effect.

The amended answer contained a general denial and a specific denial that the defendants were indebted to the plaintiff for any amounts advanced as rent. It further alleged that the plaintiff falsely represented that the installation costs would not exceed $2,500; that no payments upon the contract would be required until 60 or 90 days after the laundry had begun operations; and that the first installment payment due under the contract, and paid by the plaintiff to Industrial Credit Company, could be repaid to the plaintiff at the end of the contract period. The amended cross-petition incorporated the allegations of the amended answer and further alleged that the contract for the purchase of the laundry equipment was not a time sales contract but was in fact a direct loan made by Industrial Credit Company and was void because it was in violation of the Installment Loan Act; that the plaintiff had falsely represented to the defendants that the down payment and installation costs would not exceed $4,394.98; that the total cost of the laundry would not exceed $20,461.30; that the receipts per month would average not less than $2,000; that the operating expenses per month including payments of $611 upon the contract would not exceed $1,386; that the defendants would receive an average profit of $614 per month; and that the defendants had been induced to enter into the contract by the false representations of the plaintiff and that the defendants had been damaged thereby. There were other allegations in the amended answer and cross-petition but the foregoing is a sufficient summary for the purpose of this opinion. The defendants prayed for judgment in the amount of $19,946.75 against the plaintiff and Indus-

trial Credit Company and that the contract be canceled.

The statute authorizes an answer to include a counterclaim when the counterclaim is one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. §§ 25-812, 25-813, R. R. S. 1943. One who has been induced by fraud to enter into a contract may affirm the contract and maintain an action to recover the damages he has sustained or may set up such damages by way of defense or counterclaim. Rankin v. Bigger, 128 Neb. 800, 260 N. W. 202. "The adjustment of defendant's demand by cross-claim in plaintiff's action, rather than by independent suit, is favored and encouraged by law. Such practice serves to avoid circuity of action, multiplicity of suits, inconvenience, expense, unwarranted consumption of the court's time, and injustice." Indiana Harbor Belt R.R. Co. v. Alpirn, 139 Neb. 14, 296 N. W. 158. See, also, Louis Hoffman Co. v. Western Smelting & Refining Co., 150 Neb. 524, 34 N. W. 2d 889.

The transaction involved in this case was the sale and installation of laundry equipment in a rented building for the purpose of operating a coin-operated laundry. The defendants allege that they were induced to enter into the transaction by false representations of the plaintiff and that they have been damaged as a result of the false representations. The defendants had a right to assert their claim for damages as a counterclaim.

The defendants further allege that the contract for the purchase of the laundry equipment is in fact a direct loan by the Industrial Credit Company and is void. The defendants ask that the contract be canceled and that they recover certain amounts which they have paid to the Industrial Credit Company. A complete determination of the rights and liabilities of the defendants arising out of the contract for the purchase of

the laundry equipment cannot be made unless the Industrial Credit Company is brought into the action as a party defendant.

Any person "who is a necessary party to a complete determination or settlement of the question involved" in an action may be made a defendant. § 25-317, R. R. S. 1943. "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in." § 25-323, R. R. S. 1943. "When it appears that a new party is necessary to a final decision upon the counterclaim, the court may either permit the new party to be made, by a summons, to reply to the counterclaim, or may direct the counterclaim to be stricken out of the answer and made the subject of a separate action." § 25-815, R. R. S. 1943.

The trial court should not have dismissed the counterclaim, but could have directed that the counterclaim be stricken from the answer and made the subject of a separate action. In that event, the Industrial Credit Company would not be a necessary party to this action. But, unless the counterclaim is made the subject of a separate action, the Industrial Credit Company is a necessary party and should be brought into the action.

The judgment of the district court is reversed and the cause remanded for further proceedings in conformity to this opinion.

REVERSED AND REMANDED.

CHARLES FOUGERON ET AL., APPELLANTS, V. COUNTY OF SEWARD, NEBRASKA, ET AL., APPELLEES.
119 N. W. 2d 298

Filed February 1, 1963. No. 35352.

1. Statutes. The Legislature may classify the subjects, persons, or objects as to which it legislates if such classification rests upon differences in situations or circumstances between things dealt with in one class and those dealt with in another.
2. ———. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification.
3. Highways: Constitutional Law. Section 39-1728, R. R. S. 1943, regulating, restricting, or prohibiting ingress and egress to a state highway upon which the Department of Roads has established a limited or controlled access facility is not special legislation within the purview of Article III, section 18, of the Constitution.
4. Highways. Section 39-1728, R. R. S. 1943, is independent of and is not to be considered in connection with the general road laws, sections 39-1722 to 39-1727, R. R. S. 1943.
5. Highways: Constitutional Law. Section 39-1728, R. R. S. 1943, is not violative of the due process clause, Article I, section 3, of the Constitution, in failing to provide notice to landowners who suffer no compensable damages by the barricading of a county road.
6. Highways. An owner or a person claiming an interest in property is not entitled to recover damages for the barricade of a county road unless he has sustained an injury different in kind, and not merely in degree, from that suffered by the public at large.
7. ———. The fact that a property owner may have to travel a circuitous and longer route to reach certain points because of a barricade of a county road does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages.
8. Highways: Notice. Where the Department of Roads sends a timely notice by certified mail to the county board of the county in which a barricade of a county road is contemplated, as required by section 39-1728, R. R. S. 1943, and such notice is received and receipted for by an employee of the county clerk's office in the regular course of handling, the service of the notice is complete and in compliance with the statute.

Appeal from the district court for Seward County: H. EMERSON KOKJER, Judge. Affirmed.

Ivan A. Blevens, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, and Russell A. Souchek, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

The plaintiffs brought this suit against the State of Nebraska and the County of Seward to enjoin the closing of a county road at a point where it intersects Interstate Highway No. 80 in Seward County, and for damages. The trial court found for the defendants and dismissed plaintiffs' petition. Plaintiffs have appealed.

At the time the petition was filed in the district court the Department of Roads of the State of Nebraska was engaged in the construction of a new interstate highway across Seward County. At the section of the interstate highway giving rise to this litigation the interstate highway is being constructed in an east and west direction on the half section line through Sections 21, 22, 23, and 24, more specifically described in the petition. The plaintiffs complain of the barricading of the north and south county road at its intersection with the interstate highway between Sections 22 and 23. The county roads 1 mile east and 1 mile west of the closed road will cross the interstate highway right-of-way. U. S. Highway No. 6 lies along the south side of Sections 21, 22, 23, and 24, and is therefore one-half mile south of Interstate Highway No. 80.

Plaintiffs are the owners of 240 acres of land in the north half of Section 23 which is adjacent to the north side of Interstate Highway No. 80. It lies one-quarter mile east of the barricaded county road intersection herein involved. Plaintiffs also own 240 acres of land in Sections 26 and 27 immediately south of U. S. High-

way No. 6. The two tracts are separated by both highways No. 6 and No. 80, and the half mile that lies between them. It is the contention of plaintiffs that they have been seriously inconvenienced and damaged by the barricading of the county road in that they will be required to travel by a long and circuitous route in moving vehicles and farm machinery from one tract of land to the other. Plaintiffs contend that they were entitled to notice of the barricading of the county road, which was not given. They contend further that the barricading of the road was done pursuant to an unconstitutional law and, even if it be constitutional, that the defendants failed to comply with its provisions.

The plaintiffs state also that it was necessary for the State to take some of their lands along their south line by condemnation; that they understood the county road along the east side of Section 23 would be kept open across the interstate, but they were not informed about the barricading of the county road along the west side of Section 23; that any possible damage for barricading this county road was not taken into consideration by the appraisers in the condemnation proceeding; and that a want of notice prevented any such consideration. On the basis of these facts plaintiffs sought to enjoin the barricading of the county road.

Plaintiffs allege that section 39-1728, R. R. S. 1943, by virtue of which the county road was barricaded, is violative of Article III, section 18, of the Constitution of Nebraska, prohibiting the passage of special laws for vacating roads, and Article I, section 3, of the Constitution of Nebraska, providing that no person shall be deprived of property without due process of law. The questioned statute provides: "A county or township road may be barricaded by the road department of the state for the purpose of regulating, restricting, or prohibiting ingress and egress to a state highway upon which the department has established a limited or controlled access facility; Provided, that prior thereto the

written notice has been given by the department to the county or township board having jurisdiction of the road to be barricaded and that within thirty days from the date such notice was given, the county or township board, as the case may be, has not adopted by unanimous vote of all its members and delivered to the department a resolution opposing the barricading of such road; and provided further, that road crossings shall be provided along such controlled or limited access facilities at intervals of not to exceed five miles unless the consent of the county board has been obtained for the establishment of fewer crossings." § 39-1728, R. R. S. 1943.

The section was enacted as a part of an act recodifying the county road laws of this state. Laws 1957, c. 155, p. 508. In 1953 the Legislature gave the Department of Roads authority by condemnation or with the consent of the owner to deny access to and from the abutting lands. Laws 1953, c. 140, p. 460. In 1955 the Legislature rewrote the state highway laws and provided also for the construction of limited or controlled access facilities. Laws 1955, c. 148, p. 413. It is evident that as the need grew for the establishment of controlled or limited access roads, the Legislature extended the authority of the Department of Roads in order to provide for them. By sections 39-1722 to 39-1727, R. R. S. 1943, the method of relocating, vacating, or abandoning county roads generally is set out. By the controversial section 39-1728, R. R. S. 1943, the Legislature dealt with the method to be followed in dealing with a limited or controlled access road. Interstate Highway No. 80 is concededly such a road.

It is the contention of the plaintiffs that for the Legislature to provide a different method for the barricading of county roads in constructing a limited or controlled access facility than is provided for county roads generally is to act specially rather than generally within the purview of Article III, section 18, of the Constitution.

We do not concur in this view. Section 39-1728, R. R. S. 1943, applies to limited or controlled access facilities which provide problems altogether different than the ordinary road. It is within the legislative prerogative to place limited or controlled access facilities in a separate class for purposes of legislation. The law operates alike upon all within the class. The Legislature may make reasonable classifications of the objects of legislation for the purpose of legislating with reference thereto. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. The act is not special if it operates uniformly upon a classification reasonably made. Livingston Loan & Bldg. Assn. v. Drummond, 49 Neb. 200, 68 N. W. 375; McFadden v. Denter, 118 Neb. 38, 223 N. W. 462; Bauer v. State Game, Forestation & Parks Commission, 138 Neb. 436, 293 N. W. 282; Dorrance v. County of Douglas, 149 Neb. 685, 32 N. W. 2d 202; Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N. W. 2d 862.

Plaintiffs rely upon State ex rel. County of Dawson v. Dawson County Irr. Co., 125 Neb. 836, 252 N. W. 320, in support of their position. In that case the Legislature relieved irrigation companies of the burden of maintaining bridges over their canals, ditches, and laterals while drainage districts, mill race owners, and others constructing artificial waterways across roads and highways were not so relieved. The act did not operate uniformly upon the class of persons affected and it came within the prohibition against special legislation. The act before us operates uniformly upon a reasonable classification of highways and does not fall within the prohibition of Article III, section 18, of the Constitution.

It is further contended that section 39-1728, R. R. S. 1943, should be considered in pari materia with sections 39-1722 to 39-1727, R. R. S. 1943. This would

mean that the latter sections would have to be complied with in addition to the former in barricading a county road to deny access to a limited or controlled access facility. We think that sections 39-1722 to 39-1727, R. R. S. 1943, were intended to deal with the establishment, alteration, and vacation of public roads generally while section 39-1728, R. R. S. 1943, was intended to deal with the barricading of county roads as it related to limited or controlled access highways. Section 39-1728, R. R. S. 1943, deals with a specified class of highways and sections 39-1722 to 39-1727, R. R. S. 1943, are to apply to all other county roads. They are independent, one from the other. The intent of the Legislature is clear in this respect and it is the only logical interpretation that can be put upon the meaning of these statutes. Section 39-1728, R. R. S. 1943, was passed to facilitate the construction of limited or controlled access facilities and takes precedence over the general provisions of sections 39-1722 to 39-1727, R. R. S. 1943, as does a special provision over a general one.

The plaintiffs contend that they were not accorded due process of law in that notice of the barricading of the county road was not afforded them. The fundamental question presented is whether or not they had such an interest as to require the giving of notice. The present statute requires no notice. Admittedly the statute would be constitutionally defective if it did not meet the requirements of due process.

The Legislature has plenary powers over the public roads and highways of this state. They may be created by statute, either directly or through power delegated to proper subdivisions of the state. They may be altered or discontinued in the same manner in which they were created. Two methods are available to the Legislature in the accomplishment of this purpose; by the exercise of the police power, or by eminent domain. It is evident that the method employed in the statute before us to prevent entry from a county road to a lim-

ited or controlled access facility, in this instance an interstate highway, is by the exercise of its police power. Even though the exercise of the police power is reasonable, it must not amount to a taking of private property without due process of law. Warren v. Iowa State Highway Commission, 250 Iowa 473, 93 N. W. 2d 60.

If the barricading of the county road amounted to a taking of private property without notice, plaintiffs could properly resort to injunction even though they have an alternative remedy for damages for the taking or damaging of private property for public use under Article I, section 21, of the Constitution.

Was the closing of the county road, under the circumstances shown, a taking or damaging of plaintiffs' property that would entitle them to compensatory damages? The evidence shows that neither of plaintiffs' tracts of land abuts the intersection at which the county road is being barricaded. Plaintiffs' home place in Section 23 is more than one-quarter mile east of the county road barricade. It is obvious that the barricade will prevent the use of the county road as plaintiffs have used it in the past. It will be necessary for the plaintiffs to use a more lengthy and circuitous route to move vehicles, farm machinery, and livestock from one tract to the other. Their immediate access to the county road is not impeded, but they assert that the right of ingress and egress to their two tracts of land has been unlawfully interfered with and that they are entitled to have the barricading of the road enjoined until due process is afforded and steps taken to have the damages determined and paid.

This court has determined that a property owner suffers a compensable damage on account of the construction or vacation of a public road when egress and ingress to his property are cut off or interfered with and he has no other reasonable means of access. The right of access under such circumstances is property which cannot be taken from him without compensation. But

plaintiffs' access to the county road was in no way impeded. It was barricaded some distance from plaintiffs' property. They can still reach their lands by the public road system, although the distance will be greater and the route circuitous. The inconvenience sustained is the same as that sustained by the general public, although it may be greater in degree. One cannot enjoin the barricading of a public road where he suffers only such inconvenience or injury as is suffered by the public generally, even though his inconvenience may be greater in degree. It follows also that plaintiffs have no cause for action for damages where they have not been specially damaged. They have no claim for compensatory damages and, consequently, they were not entitled to notice in the absence of statutory requirement. Section 39-1728, R. R. S. 1943, is not invalid in failing to afford due process to the plaintiffs and is not subject to attack for unconstitutionality on that ground. Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622; Tomazewski v. Palmer Bee Co., 223 Mich. 565, 194 N. W. 571; Warren v. Iowa State Highway Commission, *supra;* Department of Highways v. Jackson (Ky.), 302 S. W. 2d 373.

Plaintiffs further contend that defendants did not comply with section 39-1728, R. R. S. 1943, in that they failed to give the notice to the county board required by that section. The facts are not in dispute. The State through its Department of Roads sent the required notice to the county board by certified mail. An employee in the county clerk's office receipted for the letter at the post office but for some reason it was never brought to the attention of the county board. It is clear that the notice was given in accordance with the statute and it came into the hands of an employee in due course of handling. The notice having come into the hands of a person entitled to accept it, the failure of the county board to give consideration to it is the fault of county board and its agents and employees, and not the

State. Even though the postal service was the agent of the State in delivering the notice, it made the delivery and the county board is bound thereby. Under the facts shown, the county board is charged with notice within the time provided by the statute.

The trial court evidently arrived at these same conclusions. Its judgment being in all respects correct, the judgment is affirmed.

AFFIRMED.

INEZ E. COCHRAN, APPELLANT, V. BELLEVUE BRIDGE COMMISSION, APPELLEE.
119 N. W. 2d 292

Filed February 1, 1963. No. 35402.

1. **Workmen's Compensation.** In a workmen's compensation case the burden is on the plaintiff to prove by a preponderance of the evidence that an accident occurred.
2. ———. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.
3. ———. In order that a recovery may be had in an action under the Workmen's Compensation Act it must be proved that an accident occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death.
4. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. This rule does not permit a court to award compensation where the requisite proof is lacking.
5. ———. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved.
6. ———. Mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability or results in death, it does not constitute a compensable accidental injury.
7. ———. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that

the injured person incurred disability or death as the result of an accident arising out of and in the course of his employment.

Appeal from the district court for Sarpy County: JOHN M. DIERKS, Judge. Affirmed.

O'Hanlon & O'Hanlon, for appellant.

Gross, Welch, Vinardi, Kauffman, Schatz & MacKenzie, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is an action brought by Inez E. Cochran, the widow of William H. Cochran, deceased, plaintiff, against the Bellevue Bridge Commission, defendant, under the Nebraska Workmen's Compensation Act. The case was tried before a judge of the Nebraska Workmen's Compensation Court, resulting in a dismissal of the plaintiff's claim. A rehearing before the Nebraska Workmen's Compensation Court was waived and the plaintiff appealed directly to the district court. The case was tried before the district court for Sarpy County. The trial court dismissed the plaintiff's petition, thus denying her claim for compensation. From the judgment of the district court, the plaintiff appealed.

The plaintiff assigns as error that the trial court erred in finding that the plaintiff failed to sustain her burden of proof by a preponderance of evidence that the decedent met his death as the result of an accident arising out of his employment; and that the trial court erred in not finding that the plaintiff's husband, while in the course of his employment, suffered accidental injuries leading to his death, which injuries arose out of and in the course of his employment.

"In a workmen's compensation case an appeal to this court is considered and determined de novo upon the record." Eschenbrenner v. Employers Mutual Casualty Co., 165 Neb. 32, 84 N. W. 2d 169.

"In a workmen's compensation case the burden is on the plaintiff to prove by a preponderance of the evidence that an accident occurred." Ruderman v. Forman Bros., 157 Neb. 605, 60 N. W. 2d 658.

"An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury. * * * In order that a recovery may be had in an action under the Workmen's Compensation Act it must be proved that an accident occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death. * * * The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim. This rule does not permit a court to award compensation where the requisite proof is lacking." Eschenbrenner v. Employers Mutual Casualty Co., *supra*.

"Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved." McDuffee v. Seiler Surgical Co., Inc., 172 Neb. 325, 109 N. W. 2d 384.

It was stipulated by the parties that the evidence adduced in the original hearing in the Nebraska Workmens Compensation Court be received and constitute the evidence on appeal in the district court.

For convenience we will refer to William H. Cochran, deceased, as Cochran.

The record discloses that Inez E. Cochran was married to Cochran in 1919; that at the time of his death Cochran was 66 years of age, 6 feet 2 inches tall, and weighed between 230 and 240 pounds; that he farmed in Taylor County, Iowa, from 1919 until 1948; that in 1949, he moved to Bellevue, Nebraska; and that he obtained a job taking care of a cash register at a filling station for a while, worked in a couple of grocery stores, and then went to work for the Bellevue Bridge Commis-

sion as a tolltaker around 1955. The toll bridge is about half a mile east of Bellevue and crosses the Missouri River into Iowa. Cochran assumed the position of foreman in 1959. His duties required him to make out a report of the types of vehicles, the money taken in, and a report of the day's work of the tolltakers, to deposit the money in the bank, and mail the report to the office in Omaha. In addition, he would relieve tolltakers on their days off, which amounted to three 8-hour shifts a week. He would also relieve the tolltakers when they were on vacation. His daily procedure consisted of walking from his home to the bridge at about 8 a.m. The bridge was about half a mile from his home, downhill and then slightly uphill to the bridge. He would get the money that was taken in by the tolltakers and return home, count the money, make out the reports, check over the tolltakers reports, then take the money to the bank and go to the post office. The bank was about 2½ blocks from his home. On October 20, 1960, he left the house following this usual routine. When he was at home he worked around the yard. Gardening was his hobby, and he worked in the garden. He would also mow the lawn and shovel snow from the sidewalks.

The plaintiff testified that Cochran had no illness of any kind a month before the occurrence on October 20, 1960; that in 1947 or 1948, he had chest and arm pains and was placed in the Veterans' Hospital in Des Moines, Iowa; that at that time he was advised by a doctor to rest about a month; that after 1949, and until 1960, he had chest and anginal pains for which he had medical treatment three times; that he had some nitroglycerin capsules when he was in the Veterans' Hospital which he carried for several years and then threw away, to which the plaintiff protested; that the last time he had any heart trouble was in the 1950's; that he lost perhaps 4 days' work due to a flu epidemic 2 or 3 years before the date of this occurrence; and that at the time

of his death this witness was dependent upon Cochran.

On cross-examination this witness testified that when her husband was released from the Veterans' Hospital he was advised to quit farming and rest because of his heart condition; that the chest and arm pains were caused by angina or a coronary disturbance; that it was no secret that her husband had a bad heart, he had gone to the Veterans' Hospital for that condition; that perhaps he did complain of dizzy spells in 1960; that when he went to Bellevue he was on a disability pension from the United States government for his heart condition; that he gave this pension up because he desired to go to work; and that he also received money from a disability policy which he carried with the Bankers Life Insurance Company of Des Moines, Iowa.

An employee of the Bank of Bellevue testified that she was on duty on October 20, 1960, at the walk-up and drive-in window in the "hut" which is a brick enclosure. There is a driveway between the "hut" and the bank. The enclosure has two serving windows, one for automobile trade and one for walk-up customers. The walk-up sidewalk runs from the sidewalk on the northeast side of the bank and is divided from the driveway by a ledge. The cashier in this facility is at about the same level as the customer, and converses outside through microphones. This witness had known Cochran for about 2 years, during which time he made deposits for the Bellevue Bridge Commission. On the morning of October 20, 1960, he came to the cashier's window. There were no other persons around the facility at that time. This witness spoke to him, and he appeared to her to be normal. He gave her the bridge deposit in a money sack which was taken by her through a door located in the facility. She started to open the money sack and was looking down when she noticed that Cochran's image was no longer at the window. She heard a thud through the microphone, looked up, and saw Cochran lying on the pavement. He had fallen

straight backward and was on his back with his feet toward the drive-in facility and his head away from it. This witness called by telephone to the bank, and the Bellevue rescue squad came to the scene. This witness further testified that it was a clear, cool day, the sidewalks and streets around the bank were dry, it was neither raining or snowing, and there was nothing slippery in the area of the walk leading into the facility.

On cross-examination this witness testified that there was nothing different that morning from any other occasion up to the time that Cochran fell over. The sidewalk he was standing on was made of concrete and was an ordinary sidewalk which was level. She did not see Cochran slip nor hear him say that he had slipped or had been pushed. So far as she knew, he was standing still immediately before he fell. He seemed to be jolly that morning, and she noticed nothing abnormal about his appearance.

Dr. Charles A. Longo testified that he had known Cochran for about 15 years and was his family physician in most cases; that he was called to the Cochran home to treat Cochran for chest pains and anginal type pain in the chest four or five times in 15 years; that he listened to his heart and could detect no murmurs or irregularities; and that Cochran had a normal heart. This witness further testified that he did not see Cochran professionally for at least 8 or 10 years, and that he only saw him four or five times in 15 years. Dr. Longo testified that he saw Cochran on October 20, 1960, at St. Catherine's Hospital in Omaha. At that time he was unconscious. The doctor suspected that Cochran had suffered a cerebral-vascular accident. He showed signs of one who had had a stroke or a cerebral-vascular accident rather than a heart attack. Cochran died on October 22, 1960. This witness ordered an electrocardiogram to ascertain the heart condition of Cochran. The report came back that there was no sign of coronary thrombosis. An autopsy was performed by Dr. Moran,

the pathologist at the hospital. This witness further testified that he indicated on the death certificate that the cause of death was skull fracture with subdural hemorrhage; and that he did not believe Cochran suffered a heart attack.

On cross-examination the surgeon's report, prepared by this witness and submitted to the workmen's compensation insurance carrier in connection with Cochran's death, was admitted in evidence. In the surgeon's report it is stated that Cochran suffered from a large heart, left circumflex branch constriction, and aortic stenosis. This report was prepared on November 8, 1960. This witness further testified on cross-examination that aortic stenosis comes about on a developmental stage over a long period of time; that aortic stenosis is a narrowing of the aorta which is a blood vessel that supplies the rest of the body and emanates from the heart; and that a man with aortic stenosis, or with a circumflex branch or vessel that was constricted, could be sitting at the dinner table or on a couch reading a newspaper and faint or die, and that would not be unusual and has occurred from time to time.

On recross-examination the doctor was asked a hypothetical question as follows: Assuming that Cochran had a large heart, that he had a left circumflex branch constriction, that he had an aortic stenosis, that he was standing at the teller's window on dry pavement, that he did not slip from any ice or snow, mud or debris, and was not pushed or shoved by anybody, and as he stood and talked to the teller he suddenly fell over backwards, would it be reasonable to conclude that he either had a fainting spell or a blackout caused by a heart condition? The doctor testified that the autopsy showed that Cochran had these conditions, and if they were severe enough, they certainly could cause him to faint or blackout and fall, and that this could happen if he were sitting at the table or in a chair in the livingroom.

In Ruderman v. Forman Bros., *supra*, a case in some

respects similar to the case at bar, the plaintiff as the widow of the deceased brought an action to recover death benefits under the Workmen's Compensation Act against the defendants. It was undisputed that her husband died while in the employ of the defendants and while engaged in the performance of his assigned duties. He and another employee were engaged in plastering a house and while so engaged he fell from the position occupied by him and died within a matter of a very few minutes. A doctor who conducted an autopsy testified that in his opinion Ruderman died from an episode of acute coronary insufficiency. The autopsy disclosed a heart which had become badly damaged over an indefinite period before death. A pathologist testified that Ruderman had a heart with extensive coronary disease changes; that in a 62-year-old man these changes were such as were commonly seen in a coronary death; that individuals with that condition sometimes collapse while just sitting at a table eating a meal, or even lying on a couch in the livingroom, or sitting in a chair reading the paper; and that in the case of Ruderman it was conjecture as to which occurred first, the fall or the cardiac failure. The court said: "Ruderman fell, and he died as the result of the failure of his heart to continue to function. The question for determination is narrowed to this: Did the heart fail to function because of the fall, or was the fall a result of the failure of the heart? * * * The evidence on which plaintiff relies leaves any answer to this question in the realm of uncertainty. The answer given by the plaintiff is based in its terms and essence on probability, possibility, speculation, and conjecture, and nothing more. * * * This being true the plaintiff has failed to sustain the burden of proving that Harry Ruderman came to his death as the result of an accident within the meaning of the workmen's compensation law."

In the instant case the plaintiff cites and relies on certain sections contained in 99 C. J. S., Workmen's

Compensation. It is true that under some of said sections there are decisions from other states cited in the footnotes that would appear to support the plaintiff's position in the instant case. However, in referring to the decisions of other jurisdictions it must be borne in mind that the compensation laws of the various states differ widely in many essential respects. The diversity of public policy demonstrated by the differences in the various laws must be considered before decisions of other jurisdictions can be accepted as controlling precedents. See, Bekelski v. Neal Co., 141 Neb. 657, 4 N. W. 2d 741; Eschenbrenner v. Employers Mutual Casualty Co., *supra.*

The following is applicable to this appeal. As far back as the case of Socha v. Cudahy Packing Co., 105 Neb. 691, 181 N. W. 706, 13 A. L. R. 513, the court cited with approval from McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A 306, referring to accidents arising out of employment, as follows: " 'It arises "out of" the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. * * * The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.' "

In Socha v. Cudahy Packing Co., *supra,* the court said:

"If a person familiar with the whole situation could reasonably contemplate that such an accident might result from the peculiar nature and circumstances of the employment, and the nature of the place where the injured man was required to work, then it may reasonably be said to arise out of it. The principles quoted from the McNicol's Case, supra, seem to us to be sound."

We have repeatedly held that mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability or results in death, it does not constitute a compensable accidental injury. See, Foster v. Atlas Lumber Co., 155 Neb. 129, 50 N. W. 2d 637; Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1; Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379; Eschenbrenner v. Employers Mutual Casualty Co., *supra.*

This record discloses no evidence on behalf of the plaintiff that the cause of the fall was industry-related. While the plaintiff's evidence attempted to establish an unexplained fall, that would not be sufficient under the law in this jurisdiction. The record shows that Cochran during his lifetime did suffer from a type of heart disease as heretofore mentioned, and in the absence of any other explanation for the fall, Cochran could have fainted or blacked out, and fallen and hit his head on the cement sidewalk. The same thing could have happened at home or any other place he happened to be at the time he sustained an attack. There was no causal connection between the fall and the employment in which Cochran was engaged in behalf of the Bellevue Bridge Commission.

In Ruderman v. Forman Bros., *supra,* this court said: "A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the injured person incurred disability or death as the result of an accident arising out of and in the

course of his employment." See, also, Snowardt v. City of Kimball, *ante* p. 294, 117 N. W. 2d 543.

The plaintiff has failed to prove her case by a preponderance of the evidence under the rules heretofore set forth.

We conclude, in the light of the authorities heretofore set forth and the facts shown in the record, that the trial court did not err as contended for by the plaintiff.

The judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

KARL G. HUETTER, APPELLANT, V. ALFRED CASCIO ET AL., APPELLEES.
119 N. W. 2d 507

Filed February 8, 1963. No. 35276.

Trial: Appeal and Error. Pursuant to the opinion in Hiner v. Nelson, 174 Neb. 725, 119 N. W. 2d 288, the instructions set out in this opinion are held not to be erroneous.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Kelley, Grant & Costello, for appellant.

Gross, Welch, Vinardi & Kauffman and Schatz & MacKenzie, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action for damages for personal injuries, brought by Karl G. Huetter against Alfred Cascio and Eileen Cascio, doing business as Cascio's Steak & Pizza House. A trial to a jury resulted in a verdict and judgment for the defendants. Plaintiff's motion for a new trial was overruled, and he perfected his appeal to this court.

Defendants operate a bar and steak house in the city of Omaha. The plaintiff, on the evening of August 28, 1959, was a patron or invitee on the premises. After plaintiff had ordered his meal, he left the table to go to the men's room. He went to a door which he assumed to be the men's room. This door was near the exit door, had no sign, and was unlocked. Plaintiff opened the door and fell down the basement steps, sustaining permanent injuries.

The trial court submitted the issue of defendants' negligence and the plaintiff's contributory negligence to the jury. No error is assigned on the sufficiency of the evidence or in the submission of the issue of contributory negligence. The only errors assigned in this court are the giving of instructions Nos. 3, 4, and 9, and the overruling of the plaintiff's motion for a new trial, which is predicated upon the giving of the alleged erroneous instructions.

The instructions complained of are as follows:

"No. 3 Some principal disputed factual contentions of the parties are: Contention A: On the occasion in suit defendants were negligent in one or more of the following respects: (1) In negligently failing to warn plaintiff of the presence of the stairway. (2) In negligently failing to barricade the stairway. Contention B: That on the occasion in suit defendants knew or in the exercise of reasonable care should have known of the absence of a barricade of the stairway. Contention C: Such negligence of defendants was a proximate cause of harm to plaintiff. Contention D: On the occasion in suit plaintiff was negligent. Contention E: Negligence of plaintiff was a proximate cause of harm to himself. The foregoing statement is not to be considered by the jury as evidence in this case but as some principal disputed factual contentions of the parties.

"No. 4 If you find that all of Contentions A, B, and C of instruction No. 3 have been proved by a preponderance of evidence, your verdict will be for plaintiff,

unless you find that both of Contentions D and E have been proved by a preponderance of evidence and you further find upon a comparison of any such negligence of the parties in accordance with instruction No. 9 that plaintiff is not entitled to recover on his claim. If any one, or more than one, of Contentions A, B, and C have not been so proved, your verdict will be for defendants. * * *

"No. 9 If you find that all contentions of instruction No. 3 have been proved by a preponderance of evidence, you will then proceed to compare the negligence of the parties. Upon such comparison you may find the degrees of negligence to be as indicated on one of the horizontal lines on the chart in this instruction, and your verdict will then be the verdict stated on the horizontal line expressing your finding.

"CHART

" 'MS' means 'more than slight'

" 'LG' means 'less than gross'

"Degree of Plaintiff's Negligence	Degree of Defendant's Negligence	Verdict for
"Slight	Gross	Plaintiff
"Slight	LG	Defendant
"MS	Gross	Defendant
"MS	LG	Defendant

"If you find for plaintiff you will deduct from the whole amount of harm experienced by him such proportion thereof as his negligence bears to the entire negligence in the case as shown by the evidence and return a verdict for the balance only."

It is readily apparent that the above instructions are exactly the same as instructions Nos. 3, 4, and 13 considered and approved by this court in Hiner v. Nelson, *ante* p. 725, 119 N. W. 2d 288. What we said in that opinion sufficiently covers the assignments herein.

We therefore find no merit in plaintiff's assignments of error, and affirm the judgment herein.

AFFIRMED.

SIMMONS, C. J., not participating.

RICHARD E. KRIMLOFSKI, APPELLEE, V. HELEN M. MATTERS ET AL., APPELLEES, IMPLEADED WITH MARTHA UERLING, APPELLANT.

119 N. W. 2d 501

Filed February 8, 1963. No. 35296.

1. **Adverse Possession.** The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.
2. **Waters.** Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong.
3. ———. Land uncovered by a gradual subsidence of water is not an accretion but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner.
4. ———. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.
5. ———. Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner.
6. ———. The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto.
7. ———. Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance

short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact.

8. ———. Land, to be riparian, must have the stream flowing over it or along its border.

Appeal from the district court for Washington County: DONALD BRODKEY, Judge. Affirmed.

Paul I. Manhart, for appellant.

Swarr, May, Royce, Smith, Anderson & Ross, for appellee Krimlofski.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This was an action brought in the district court for Washington County, Nebraska, by the plaintiff and appellee Richard E. Krimlofski against the defendant and appellant Martha Uerling and other defendants to quiet title to real estate lying on the west bank of the Missouri River. All defendants except the appellant Martha Uerling defaulted.

The plaintiff's petition sought to quiet title to a tract of land designated in exhibit No. 1 as Tract C, and described by metes and bounds in the judgment of the trial court. The tract is bounded on the west by the centerline of a chute or dry run, on the east by the present west bank of the Missouri River, on the north by the north line of Section 34, Township 17 North, Range 13 East of the 6th P.M., and on the south by the south line of Government Lot No. 1 of said section, assuming both of said lines were extended eastward to the river. The tract contained 81.58 acres. Government Lot 1 or Lot 2 may be referred to simply as Lot 1 or 2.

Plaintiff's asserted claim of ownership was by adverse possession of an island formed in the river and accretion

and reliction east towards the river and the west to the chute.

Defendant by her answer and cross-petition claimed the premises as owner by a chain of title from the United States to said Lot 1 on the west bank of the river and accretion thereto, and adverse possession in herself and predecessors in title. Her cross-petition asked that her title be quieted as against all parties to the action.

A trial to the court resulted in a finding and judgment for the plaintiff. Defendant's motion for a new trial being overruled she has brought the cause to this court on appeal.

The defendant's assignments of error, so far as need be considered by us, are that the judgment is contrary to the law and the evidence. She alleges that the trial court erred in admitting certain evidence but neither in the assignment of error nor the motion for new trial is the evidence referred to set out, though it is alluded to in the argument, and it cannot be considered on appeal.

Since 1912, plaintiff made a hobby of fishing and hunting and protecting wild animals. In 1922, he obtained permission from James Snodderly, the owner of Lot 2 to the south of Lot 1, to use his river-front as a headquarters and boat landing. The landing was about 200 feet north of Snodderly's house. Plaintiff brought there at first two inboard motorboats and rowboats. A road running north out of Florence known as the River Road ran through Lots 1 and 2, leaving about 50 feet of ground between this road and the landing at Snodderly's. In the year 1926, Snodderly gave Krimlofski the land in Lot 2 which lay east of the road. The plaintiff by means of his boats had access to the island from the landing. Snodderly's house burned in 1930 and plaintiff built and paid for another for him with an understanding that he be given Lot 2. Snodderly died without signing any papers and plaintiff later bought the lot at public sale. In 1926, a sandbar had formed an

island east of the Snodderly Lot which extended north beyond the north line of Lot 1, and south in front of the place south of the Snodderly Lot known as the "Burket Place." Lot 1, according to the evidence of plaintiff, had then been washed away except for a few acres. In 1926, plaintiff put duck blinds on different parts of the island. Thereafter, he hunted and fished thereon and invited his friends. He ordered away those not invited and patrolled the island at times. At different times he brought houseboats and installed several places to anchor them on both sides of the island. Further details of plaintiff's evidence as to his occupancy will not be set out as plaintiff's evidence was substantially the same in this action with respect to the premises in suit as it was on his behalf in a previous case in this court concerning the land claimed by Burket lying further south on this same island. Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57. Plaintiff's witnesses testified much the same as to the occupancy in both cases and there are many photographs in evidence showing the presence of the witnesses at and near the disputed premises and in the plaintiff's boats at outings throughout the years 1926 to 1948.

In 1926, and for many years thereafter, plaintiff and several witnesses testified that a large body of water about 200 feet in width ran between the island and the bank of the river to the west. Plaintiff's houseboats made trips up this waterway and around the island. As the years went by the trees and vegetation grew thereon. The willows held the silt and debris from floods and the island became larger. By accretion and reliction the island extended farther into the river on the east side and towards the shore on the west. This process was greatly accelerated after revetments were built to control the river north of the island in 1936. The western shore extended in the same manner and in time it was divided from the accretion from the island only by a small stream denominated throughout

the case as "the chute." Later except in times of high water it became but a "dry run." Plaintiff testified the trees in the center of the island were larger and tapered off in height toward the chute; and that those on the higher land to the west likewise were larger and became shorter as they approached the chute.

A surveyor who testified for the plaintiff introduced more than 55 maps made by goverment engineers in their work on the river which showed the island, the river on its west, and the growth of the island over the years. Some of the earlier maps show but a small spot where the island was, and on some it cannot be seen. The witnesses however testified that at times the bar was covered by high water. The surveyor also testified the maps made by the government engineers were sometimes made to picture the shore from boats, and islands were not always noticed. In some instances only the shoreline or the main course of the river was desired to be traced. We think these show the island and its growth and acceleration after the time the revetments were built in 1936. Aerial photographs were likewise introduced that tend to show this also.

Defendant produced a witness Andreas Andreason whose testimony sharply conflicted with this evidence. He testified that in 1936 and 1937 he cut and hauled willows over the land involved for government use in riprapping; that Lot 1 and its accretion, from which the defendant's claim stems, extended three-quarters of a mile to the river; that he drove right through it; that there was no chute off the river though water was brought down to the lower areas at times through a creek or draw; and that the so-called "chute" was a dry slough, dry enough on the land in suit to haul willows with a team and wagon to the east river bank.

This conflicts with several maps prepared by the Corps of Army Engineers at different times in 1936. They are numbered in sequence as exhibits 58-16 to 58-22 in which the island in question is plainly shown,

together with the river on the west thereof with its soundings placed on the exhibits. The water at all times shown on those maps appears at least 3 or 4 feet deep and on those dated in July of that year, 12 to 20 feet in depth.

It likewise conflicts with one of the defendant's witnesses who testified that there was a split channel and an island in the year 1936.

The government patent at entry No. 23 of the defendant's abstract of title dated October 16, 1903, shows the area in Government Lot 1 to be 34.20 acres. The deed at entry No. 36, dated September 26, 1910, and another entry No. 37, dated January 18, 1911, both describe Lot 1 as "9 acres more or less with all accretions and increases." It would appear that at this time most of Lot 1 was considered by the grantors to be washed away.

The testimony of the remaining witnesses of the defendant, one her brother-in-law and three her nephews, was largely negative in character. It is to the effect that they were on the premises in question on occasions and didn't see the signs, fences, blinds, or paths testified to by the plaintiff nor did they meet him or anyone thereon at those times. Moreover most of these witnesses did not testify concerning the premises prior to 1940 at which time the nephews were quite young.

The defendant received a deed from Emma Jacobus dated in December of 1949. The premises were therein described as the northeast quarter of the northeast quarter of Section 33, and Lot 1 of Section 34, Township 17 North, Range 13 East of the 6th P.M. No accretion is mentioned therein. The purchase agreement dated in November 1949 between the same parties contains the same description followed by the words "containing 40 acres more or less." In 1955, defendant procured a second deed from Emma Jacobus, dated August 12, 1955, and recorded that day, describing Lot 1 of said section, followed by a metes and bounds descrip-

tion of the land in question to the banks of the Missouri River. The defendant's agent bulldozed plaintiff's fence down in August 1955, which was followed by plaintiff bringing this action on August 19, 1955. Emma Jacobus testified by deposition. She testified that she and her deceased husband, who owned the land as joint tenants, bought it in 1927 or 1928; and that the road then ran at the foot of the hill and the river was right next to the road. They both lived at Florence until his death after which she continued to reside there. At the time of her deposition she lived at the Florence Home for the Aged. The Jacobuses placed no buildings, improvements, or fences on the premises. They had no boats and took no outings or picnics thereon. After her husband's death in 1943 she viewed it from the road only as she drove past it on two or three occasions.

It seems clear that the defendant's predecessor in title was not even conscious of the existence of extensive accretion land when she entered into the purchase agreement with the defendant. Neither is there evidence of any operations on the land in suit by the defendant or her agents after her purchase except the testimony of "walking through" it at infrequent intervals. Her first deed was dated within 10 years of the filing of this suit and no right by adverse possession could accrue during the period of her ownership.

The rules of law applicable to this action are all set out in the case of Burket v. Krimlofski, *supra*, involving similar claims on this same island. We shall now state them. "The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.

"Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied

for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong.

"Land uncovered by a gradual subsidence of water is not an accretion but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner.

"Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.

"Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner.

"The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto.

"Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretion to the line of contact.

"Land, to be riparian, must have the stream flowing over it or along its border."

From the evidence in this case it appears the claims of the plaintiff as to occupation of the island openly, exclusively, and continuously under claim of ownership for more than 10 years following the late 1920's, were amply proved by the preponderance of the evidence. His use of the island was for the purposes to which it could be adapted. Further we find the preponderance of the evidence shows that the land between the island

and the chute was accretion land attached to the island and not the mainland. Also the defendant failed in her proof concerning any title acquired to the lands in suit by adverse possession.

It follows that the judgment of the district court was right and should be affirmed

AFFIRMED.

SIMMONS, C. J., not participating.

ALF ELANDER, APPELLANT, V. KELLOGG GRAIN COMPANY, A CORPORATION, ET AL., APPELLEES.
117 N. W. 2d 522

Filed February 8, 1963. No. 35299.

1. **Chattel Mortgages.** The description of property in a chattel mortgage will as a rule be held sufficient where it will enable a third party, aided by inquiries which the instrument itself suggests, to identify the property.
2. **Trover and Conversion.** In an action for conversion, the identity of the property must be established by a preponderance of the evidence.
3. **Chattel Mortgages.** When the rights of third persons become involved, a mortgage of a specified number of chattels out of a larger number, or of a specified quantity out of a larger mass, which does not furnish data for the separation of the mortgaged chattels, is, when there is no separation or delivery, void for uncertainty.
4. ———. Where a mortgage describes a specific quantity out of a larger mass, until separation is made the most that the mortgagee can require is that the mass not be depleted below the quantity specified in the mortgage.
5. **Appeal and Error.** The efficacy of a correct decision by a court is not diminished or destroyed by the assignment or the adoption of an erroneous reason for it.
6. ———. This court is not limited to the reason by virtue of which a district court made a decision.

Appeal from the district court for Perkins County: VICTOR WESTERMARK, Judge. Affirmed.

Firmin Q. Feltz, for appellant.

Hastings & Wanek, for appellee Kellogg Grain Co.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a conversion action brought by Alf Elander against Kellogg Grain Company, a corporation, and Theodore (Jim) Apolius, to recover a balance due of $3,000 and interest on an $8,000 note secured by a chattel mortgage on 6,000 bushels of wheat. A motion for a directed verdict or to dismiss was sustained at the close of plaintiff's case. Plaintiff perfected his appeal to this court.

The controlling rule when a motion for dismissal or directed verdict is sustained at the close of plaintiff's case is that every fact alleged which the evidence tends to support will, for the purposes of the motion, be considered as proved. See Canaday v. Krueger, 156 Neb. 287, 56 N. W. 2d 123.

With the above rule in mind, we determine the facts to be as set out herein. On September 4, 1957, Theodore (Jim) Apolius, hereinafter referred to as Apolius, borrowed $8,000 from the plaintiff and executed a note for that amount due March 4, 1958, secured by a chattel mortgage executed at the same time on 6,000 bushels of wheat. The portion of the chattel mortgage material to decision herein is the following: "The undersigned, of Keith County Nebraska for the purpose of securing payment of Eight Thousand & no/100 Dollars and interest according to the conditions of 9/4/57 promissory note, of even date herewith payable March 4, 1958, for $8,000.00, do hereby sell, convey and mortgage unto Alf Elander and its assigns, the following described property, now in my possession, to-wit: 6,000 Bu. Wheat - (Six Thousand) located on W-½ 6-12-37 Keith County, Nebr. & on N.E. ¼ 8-12-37 Keith County, Nebr. stored in aproved (sic) Frame Grainreys (sic) owned entirely by us and free and clear of encumbrances.

"This mortgage is intended to include the increase of any stock above described. The above described property is now kept on NE Quarter of Sec 8, Twp. 12, R 37, Keith County Nebraska."

This mortgage was filed for record in Keith County September 19, 1957. The evidence indicates that the west half of Section 6, Township 12 North, Range 37 West, described above, is a misdescription. Wheat belonging to Apolius was actually stored on the east half of Section 6, Township 12 North, Range 37 West, and Apolius had no connection with the west half of said section. At the time of the execution of the mortgage, the defendant had on hand at least 13,500 bushels of wheat. His testimony is that he had 5,000 bushels stored in a frame granary on the east half of Section 6, Township 12 North, Range 37 West in Keith County, Nebraska, and 8,500 bushels stored in a frame granary on the northeast quarter of Section 8, Township 12 North, Range 37 West in Keith County, Nebraska; that in addition thereto, he had 1,000 bushels stored in a garage on the northeast quarter of Section 8, which was used as a granary; and had 1,200 bushels stored in a steel granary on the east half of Section 6.

The Kellogg Grain Company, a corporation, hereinafter referred to as Kellogg, through the manager of its elevator at Grant, Nebraska, purchased approximately 3,500 bushels of wheat from Apolius for which it paid him $6,294.79, which was stipulated to be the fair and reasonable market value of the wheat. These purchases were as follows: October 17, 1957, approximately 2,500 bushels for $4,410.92; November 7, 1957, approximately 500 bushels for $916.12; and February 26, 1958, approximately 500 bushels for $967.75. These sales were made by Apolius without the consent or the knowledge of the plaintiff. Kellogg's manager at Grant knew that Apolius lived in Keith County but did not check the chattel mortgage records in that county or make any inquiry to determine if the property was mortgaged. The evi-

dence is undisputed that Apolius also owned and farmed a half section of land in Perkins County, the county in which Grant is located. The wheat from this Perkins County farm was stored on the northeast quarter of Section 8, Township 12 North, Range 37 West, in Keith County. Apolius made the following payments on the note: October 25, 1958, $480 interest; September 26, 1959, $4,000; and March 26, 1960, $1,000, and the interest due to March 26, 1960.

The plaintiff did not see or inspect his security at any time. He made no attempt to do so until September 23, 1959, when he visited the Apolius farms and found the granaries empty. This action was commenced October 19, 1960, alleging that the mortgage had never been paid or released; that the plaintiff was entitled to the possession of the mortgaged property; that the plaintiff's lien followed the proceeds of the wheat sold to Kellogg; and that Kellogg's failure to pay the plaintiff constituted a conversion of mortgaged property. The evidence is undisputed that at the time Kellogg purchased the wheat, Apolius still had 6,000 or more bushels of wheat remaining in his possession in the frame granaries.

The trial court held that the plaintiff's mortgage was void for insufficient description, and sustained the motion of Kellogg for a directed verdict and a dismissal. Kellogg argued that inasmuch as the wheat is stored in frame granaries on two different sections, and they contained much more than 6,000 bushels with no information as to the amount intended to be covered in each granary, the case is controlled by Grimes v. Cannell, 23 Neb. 187, 36 N. W. 479. In that case, the court held a mortgage on 10,000 bushels of ear corn in cribs 1 and 2 on a side track was too indefinite when the proof disclosed there were three cribs, without any designation as to numbers.

Plaintiff contends the case is governed by McCormick Harvesting Machine Co. v. Reynolds, 62 Neb. 892, 88

N. W. 130. In that case, the mortgage described " 'Five hundred bushels yellow corn now in pile on ground on Gilman farm, * * *.' " There was in fact more than 1,000 bushels in the pile, but there was only one pile of corn on the farm. The court held under the circumstances in that case a valid mortgage could be given on an aliquot number of bushels, and followed the rule announced in Buck v. Davenport Savings Bank, 29 Neb. 407, 45 N. W. 776, 26 Am. S. R. 392, that: "The description of property in a chattel mortgage will as a rule be held sufficient where it will enable a third party, aided by inquiries which the instrument itself suggests, to identify the property."

There were 8,500 bushels of wheat in a frame granary on the northeast quarter of Section 8 as well as 1,000 bushels stored in a garage designated as a granary. There were 5,000 bushels in a frame granary on the east half of Section 6. There was also a steel granary holding 1,200 bushels on this section. No attempt was made to prove any of the granaries were "approved frame granaries." The case was tried on the assumption the granaries with the 8,500 bushels and the 5,000 bushels were the granaries described. As we view the evidence, a decision in this case does not depend upon a determination of the sufficiency of the mortgage description. Because it is not necessary to decide the question, we will assume for the purposes of discussion the validity of the mortgage.

The only evidence offered to connect the mortgaged wheat with that sold to Kellogg is the following: " 'Question: Could you recall perhaps the first time after harvest when you commenced hauling wheat? Answer: Yes, I hauled wheat to make room for my corn. Question: And when was this wheat hauled? Answer: Well, it would have to be hauled after the middle of October. Question: 1957? Answer: Uh-huh. Question: And do you recall approximately how much wheat you hauled at that time? Answer: No, I can't recall

approximately how much I had hauled. Question: Do you recall where you hauled it?' * * * 'Answer: It came out of the granary on the Northeast Quarter of 8 of the big bin that the bulk of which came from the Perkins County farm and it was the driveway of this granary that holds approximately 4,000 bushel, and I also cleaned out my garage driveway which, I don't remember what was in there. I said a while ago, approximately. That would be what it was.' * * * 'Question: And do you recall where you hauled that to? Answer: Well, I most generally hauled—' MR. WANEK: I move to strike the rest of that answer as not responsive, Your Honor. THE COURT: Overruled. 'Question (answer): (Continuing)—whichever direction the roads were the best and who was paying the most money. And I hauled —I can't recall just exactly where I hauled it, but I sold a lot of wheat to Floyd.' " (Floyd Stewart was the name of the manager for Kellogg at Grant.)

It is evident that this evidence is not sufficient to prove that Kellogg purchased mortgaged grain stored in the frame granaries. The most it says is that a lot of wheat was sold to Kellogg. The witness talks of wheat in the driveway of a granary holding 4,000 bushels. The frame granary on the northeast quarter of Section 8 holds 8,500 bushels and was completely filled after the 1957 harvest. Further, under no construction could wheat in the garage driveway be held to be covered in the mortgage. It is elementary that, in an action for conversion, the identity of the property must be established by a preponderance of the evidence. See 89 C. J. S., Trover and Conversion, § 132, p. 621.

Continuing with the testimony: " 'Question: And again at the time that this wheat was hauled, you had remaining in your possession 6,000 or more bushels of wheat? Answer: Yes. Question: Now did you at some later date dispose of the balance of this wheat? Answer: Yes. Question: Will you describe for us the circumstances under which this occurred? Answer:

Now we are in '58? Question: I don't know when. Answer: Naturally, there is no wheat now, and it has been disposed of. I recall asking Elander if it would be all right to move the wheat to make room for a new crop. Question: Now do you recall when this conversation took place, approximately? Answer: Well, it was prior to harvest in the following year. Question: It would be prior to the harvest of 1958? Answer: Yes. —Question: And at this time do I understand that you had 6,000 or more bushels of wheat on hand? Answer: Yes, somewhere in that category. I don't remember what was there just exactly.' "

Assuming for the sake of discussion that the plaintiff has proved that all of the wheat purchased by Kellogg came from the frame granaries designated in the mortgage, which assumption is not sustained by the evidence, there is no dispute that Apolius still had 6,000 bushels of wheat on hand in the frame granaries after the sales to Kellogg. In fact, there were still more than 6,000 bushels on hand prior to the harvest in 1958 when Apolius asked plaintiff's permission to move the wheat to make room for the 1958 crop. The only purchase made by Kellogg in 1958 was approximately 500 bushels February 26. There is no indication as to how long before the harvest the conversation in question took place, but the inference would be that it was after February.

It is the plaintiff's position that until he selects the 6,000 bushels of wheat from the 11,000 or more bushels of wheat in the frame granaries on the two sections, his mortgage covers any portion sold from the more than 11,000 bushels stored therein. Plaintiff contends it was impossible for Apolius to sell any wheat from the total amount in the frame granaries without selling the plaintiff's security, until a selection was made. This position is too obviously fallacious to require extended discussion. While a right of selection may exist between the mortgagee and the mortgagor, until that right of selec-

tion has been made, unless there is sufficient data, aided by inquires suggested by the mortgage, to permit a selection to be made by a third party, the mortgage is void for uncertainty as against third parties. Plaintiff cites 14 C. J. S., Chattel Mortgages, § 61, p. 669, as authority for his position. We call attention to the following language in that citation: "* * * when the rights of third persons become involved, the great weight of authority supports the rule that a mortgage of a specified number of chattels out of a larger number, or of a specified quantity out of a larger mass, which does not furnish data for the separation of the mortgaged chattels, is, when there is no separation or delivery, void for uncertainty, * * *." It is not necessary to decide the question as to whether sufficient data is furnished in plaintiff's mortgage to permit a separation of the mortgaged wheat. As we interpret the rule enunciated in McCormick Harvesting Machine Co. v. Reynolds, *supra,* the most the plaintiff could require is that his security not be depleted below the amount covered by his mortgage, or 6,000 bushels. It was not so depleted until after the sales to Kellogg. Where a mortgage describes a specific quantity out of a larger mass, until separation is made the most that the mortgagee can require is that the mass not be depleted below the quantity specified in the mortgage.

The trial court disposed of this case on a point we do not deem it necessary to decide. However, the efficacy of a correct decision by a court is not diminished or destroyed by the assignment or the adoption of an erroneous reason for it. This court is not limited to the reason by virtue of which a district court made a decision. See Preferred Pictures Corp. v. Thompson, 170 Neb. 694, 104 N. W. 2d 57.

As we view the record, the plaintiff failed to prove that the wheat sold to Kellogg was the wheat covered by the mortgage. However, even if we were to assume that the plaintiff had proved that the wheat purchased

by Kellogg came from the frame granaries described in the mortgage, the plaintiff could not recover. More than 6,000 bushels remained in those granaries after Kellogg made its purchase.

We determine that the motion of defendant Kellogg for a directed verdict and for a dismissal of the action should have been sustained for the reasons given. We therefore affirm the judgment of the trial court.

AFFIRMED.

SIMMONS, C. J., not participating.

CHARLES E. (TIM) GRANTHAM, APPELLANT, V. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, A CORPORATION, ET AL., APPELLEES.

119 N. W. 2d 519

Filed February 8, 1963. No. 35337.

1. **Insurance: Damages.** Where the provisions of a fire insurance policy contemplate that in the event of fire loss the actual cash value of the property before the fire and the actual cash value after the fire shall be compared, the measure of damage is the difference between the two, subject however to limitations, if any, expressed by the terms of the policy.
2. ———: ———. A limitation contained in an insurance policy wherein the basic measure of damage is value before and after a fire is not a substantive measure of damage.
3. **Appeal and Error.** In a case where evidence has been wrongfully admitted the admission will be regarded as prejudicial unless it clearly appears that it did not affect unfavorably the party against whom it was admitted.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Dryden & Jensen and Andrew J. McMullen, for appellant.

Dier & Ross and Jack M. Pace, for appellee Farmers Mutual Ins. Co.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action at law instituted by Charles E. (Tim) Grantham, plaintiff and appellant, against Farmers Mutual Insurance Company of Nebraska, a corporation, a defendant in the case, which is appellee herein. There were two other defendants but for reasons which do not require mention they are no longer parties, in consequence of which the corporation will be referred to hereinafter as the defendant. The action is for the recovery of damages, caused by fire which occurred on or about October 30, 1960, to a building owned by the plaintiff located on land, which does not require description herein, in Kearney, Buffalo County, Nebraska, which property was insured against damage or destruction by fire by a policy of insurance issued by the defendant.

The case was tried to a jury and a verdict was returned in favor of plaintiff for $4,151.93. Motions for new trial were duly filed by both the plaintiff and the defendant. These motions were overruled and judgment was rendered on the verdict. By the judgment an award of $250 was made as an attorney's fee for the attorney for the plaintiff and taxed as costs against the defendant. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

As grounds for reversal the plaintiff asserts in substance by assignments of error, (1) that the court erred in refusing to accept evidence of the plaintiff and of witnesses in his behalf as to the value of the building before and after the fire; (2) that the court erred in refusing to accept evidence of the fair cost of the repair of the building of the plaintiff and an unnamed witness; (3) that the court erred in instructing the jury that the measure of damages was the cost of repair of the building under the terms of the policy of insurance; and (4)

that the court erred in fixing the amount of attorney's fees allowed.

From the record and these assignments of error it becomes apparent that questions of disputed fact, except as to the matter of the attorney's fees, are not involved. The other three deal exclusively with questions of whether or not the court erred in restricting proof of the plaintiff's cause of action, and whether or not the theory submitted by the instructions as to the measure of plaintiff's damage was erroneous.

The parties are in accord that there was a fire, that property was damaged thereby, that the property damaged was insured by the defendant, and that the plaintiff was entitled to recover damages. They agree that the plaintiff, under the declaration of the insurance policy, is entitled to recover "the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair."

On the trial of the case the court by its rulings on the admissibility of evidence and by instruction to the jury fixed the measure of plaintiff's damage as "only such a fair and reasonable amount as was necessarily required to repair or replace the damaged parts of the building with material of a like kind and quality within a reasonable time after such loss." The theory on which this action of the court was based was that this quoted language described and declared this as the only measure of damage available to the plaintiff. It refused to permit proof of damage based on any other standard or measure and in particular the measure based on the difference between market value before and after the fire.

In this area the plaintiff called a witness obviously for the purpose of qualifying and giving testimony as

to the value of this property before and after the fire. Objection was made to this line of questioning on the ground that the inquiry did not relate to a proper measure of damages. The objection was sustained on the stated ground of lack of foundation but it is made clear that the true ground was that it related to the declared improper measure of damages.

Another witness was called. He was allowed to qualify as an expert on value out of the presence of the jury and to have his testimony as to value placed in the record but this was never allowed to be given to the jury for consideration. He testified that the value before the fire was $20,000 and somewhere between $8,000 and $10,000 after the fire.

The plaintiff testified in his own behalf and the court declared in the record that as owner it was proper for him to state the value of the property before and after the fire, which he stated was $20,000 before, and $8,000 after, but this was not allowed to be considered by the jury for the reason that it was not in proof of the court's declared proper measure of damages.

By reason of this the plaintiff asserts he was denied the right to prove his cause of action as he had the right to do under law and that he was thereby prejudiced. Specifically the plaintiff asserts that the measure of his recovery was the difference between the market value immediately before and immediately after the fire, but that the right to adduce evidence to sustain his cause of action pursuant to this measure was refused.

This view of the plaintiff must be accepted as controlling. No case has been cited by the defendant which holds to the contrary. In truth the cases cited by it relating to this subject sustain this view.

In Voges v. Mechanics Ins. Co., 119 Neb. 553, 230 N. W. 105, a case in pertinent aspects like the one here, it was said: "As applied to the facts in the present case, the provisions of this policy contemplate that the 'actual cash value' of the building as it stood on the ground

prior to the fire shall be compared with the 'actual cash value' of the same building at the conclusion of the fire, and that the difference shall be taken as the measure of damages, subject, however, to the limitations expressed in the terms of the policy." In that case the limitations in the insurance policy were substantially the same as those in the policy of insurance involved herein, and in the opinion it is pointed out that such a declared limitation is merely a limitation of the insurer's liability, and is not a substantive measure of damages.

The rule stated above is discussed in considerable detail and unequivocally approved in Clouse v. St. Paul Fire & Marine Ins. Co., 152 Neb. 230, 40 N. W. 2d 820, 15 A. L. R. 2d 1008. It is also approved in Borden v. General Ins. Co., 157 Neb. 98, 59 N. W. 2d 141.

On the basis of these decisions it follows that the refusal of the court to allow the plaintiff to prove his cause of action by evidence of value before and after the fire was erroneous.

It is of course true that it cannot be said that if the plaintiff had been permitted to prove his case as he was entitled to do that the verdict of the jury would have exceeded the amount awarded. Notwithstanding this the error must be regarded as prejudicial.

The rule which is controlling in this situation is contained in Borden v. General Ins. Co., *supra*, as follows: "If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case did not affect the result of the trial unfavorably to the party against whom it was admitted its reception must be considered prejudicial error." In the instance here evidence was wrongfully rejected, but of course the rule is applicable in case of wrongful rejection as well as wrongful admission. Numerous other cases are cited in the opinion which support this rule.

For the reasons stated herein the plaintiff is entitled to a new trial. This conclusion renders unnecessary further consideration of the assignments of error.

The judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

ELAINE JEAN SPILNEK ROSS, APPELLANT AND CROSS-APPELLEE, V. EVERT A. ROSS, APPELLEE AND CROSS-APPELLANT.

119 N. W. 2d 495

Filed February 8, 1963. No. 35359.

1. **Appeal and Error.** On trial de novo, when the evidence on material questions is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and the conclusions of the trial court with regard to this testimony will be carefully regarded by this court.
2. **Divorce.** Extreme cruelty under the statute consists of any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such conduct as utterly destroys the legitimate ends and objects of matrimony.
3. ———. Corroboration of the acts of extreme cruelty testified to by a plaintiff in a divorce action is a basic essential for the right to a decree of divorce. The degree of corroboration required must be determined on the facts and circumstances of each particular case.
4. ———. Corroboration relied upon in a suit for divorce must be competent evidence of the acts and conduct asserted as a ground for divorce.
5. ———. Ordinarily, condonation is complete if there is a resumption of marital relations after the alleged breach of marital duty.
6. ———. In determining the question of who should have the care and custody of the children, the paramount consideration is the best interest and welfare of the children. This judgment is necessarily prospective in nature and a consideration of their future environment after the date of the decree will be carefully considered. Where the trial court has observed the witnesses and heard the testimony, and has made an independent investigation of the circumstances, if the decree in this respect

is justified by the evidence, its discretion will ordinarily not be disturbed.

Appeal from the district court for Howard County: DONALD H. WEAVER, Judge. Affirmed as modified.

E. Merle McDermott, for appellant.

Kelly & Kelly, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

The issues in this case are clearly drawn from the plaintiff's petition, and the defendant's responsive amended answer and cross-petition, upon which the case was tried. Each party alleges extreme cruelty, denies the allegations of cruelty as to the other, and prays for divorce. The plaintiff asks also for child support, alimony, and a division of the property acquired by the parties during their marriage. The court denied the plaintiff a divorce, granted the defendant an absolute divorce on the cross-petition, and gave him the custody of the two minor children. The plaintiff was awarded alimony of $3,000 payable in certain installments. The plaintiff perfects her appeal to this court. By appropriate assignments of error, plaintiff asserts she is entitled to a divorce, custody of the minor children, and that the award of alimony was insufficient.

We deem the following applicable to this appeal: "In an appeal to this court in a divorce action the cause is tried de novo. Messer v. Messer, 157 Neb. 312, 59 N. W. 2d 395; Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368. * * * When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Stohlmann v. Stohlmann, 168 Neb. 401, 96 N. W. 2d 40; Dier v. Dier, 141 Neb. 685,

4 N. W. 2d 731. * * * Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes 'extreme cruelty.' See, § 42-302, R. R. S. 1943; Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321; Egbert v. Egbert, 149 Neb. 227, 30 N. W. 2d 669; Workman v. Workman, supra. * * * Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony. See, Messer v. Messer, supra; Workman v. Workman, supra." Waldbaum v. Waldbaum, 171 Neb. 625, 107 N. W. 2d 407.

Corroboration of facts alleged in the petition is a basic essential under our statute for the right to a decree of divorce. § 42-335, R. R. S. 1943. No general rule may be laid down as to the degree of corroboration required, but each case must be decided on its own facts and circumstances. Goodman v. Goodman, 168 Neb. 841, 97 N. W. 2d 336; Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505; Schlueter v. Schlueter, 158 Neb. 233, 62 N. W. 2d 871. Corroboration relied upon in a divorce action must in itself be competent evidence of the acts and conduct asserted as a ground for divorce. Laughrey v. Laughrey, 171 Neb. 132, 105 N. W. 2d 576.

The parties were married August 11, 1948. Plaintiff is now 30 years of age and the defendant 35. They have two children, a girl and a boy, ages 10 and 7, respectively. The defendant owned no real estate, but all during the course of their marriage, he operated a farm of 178 acres near St. Paul, Nebraska. They accumulated various items of personal property, automobiles, machinery, cattle, and grain by their joint efforts during

this period of time until their separation on or about October 30, 1961. The defendant, besides conducting the farm operation, worked at an ordnance plant from 1952 to 1954, drove a school bus from 1956 to the spring of 1961, and beginning in the spring of 1961 was employed by a construction company involved in land leveling.

From this general summary of their marriage, we proceed to an evaluation of the evidence. Until approximately August 1961, it appears that their marital life was generally harmonious and that the nature of the disputes and arguments arising in that period of time can be characterized only as the normal day-by-day incompatibilities and arguments incident to the ordinary marriage. The plaintiff attempts to detail certain acts of physical cruelty beginning in the first year of their marriage. She recites an argument at that time about some pigs and relates another occurrence in the year of 1956. Her testimony, even as to these specific events, is vague and general in nature. Outside of this testimony, she claims generally that the defendant beat her and struck her on an average of once a month during the ensuing 13 years. This testimony is entirely uncorroborated, except as to a general recollection by the parents of the plaintiff as to the belligerency of the defendant and that he did take hold of her at certain times. The record is devoid of any evidence on her part that said acts were of such a character at the time, or had such a continuity, that they affected her bodily or mental health during this period of time. The defendant denies all testimony relating to these events. It is also apparent that the plaintiff continued the marital relation after each and all of the alleged acts of physical cruelty. Condonation is complete if there is a resumption of marital relations after the alleged breach of marital duty. Mislivec v. Mislivec, 172 Neb. 290, 109 N. W. 2d 393.

The serious difficulty between the parties appears to

have arisen soon after the defendant was employed with Swatter, Incorporated, a land leveling construction firm, and the association that developed between the plaintiff and the defendant's employer on this job, a Mr. Oltman. In August 1961, both parties testified that they began to have arguments concerning her conduct and activity with relation to Oltman and Oltman's visits to their home. The nature of these visits, and whether Oltman visited alone, are in dispute between the parties. The defendant's version of this situation was definitely corroborated by the eyewitness testimony of the next door neighbors living approximately within a block away. The plaintiff complains of an incident in September 1961, when she went to town and the defendant hid in the trunk of her car, and when she discovered him, he was holding a gun. She does not contend that the gun was pointed at her or that the defendant threatened her with it. Her testimony as to the condition of the gun is uncorroborated, while the defendant's testimony, that it was broken and unsuitable for use, is corroborated. It appears that after this incident, they both went home and continued their marital relationship. While the defendant's admitted conduct in this instance appears to be rather bizarre in character, we can find nothing in this isolated incident that would justify a finding of extreme cruelty within the range of the application of the rule. A few days after the incident mentioned above, the plaintiff complains, in substance, of the erratic driving and conduct of the defendant in connection with returning from a party they went to at Paplin, Nebraska. At this party, they were the guests of Oltman, defendant's employer, and in the company of other employees with whom the defendant had been working. The testimony of the plaintiff is vague and indefinite as to the incidents during the evening prior to their departure. During the evening, it developed that she left the party and was gone for a considerable period of time in the company of Oltman,

his wife, and some other people. This, in turn, incited the defendant's suspicions, and the evidence is substantially to the effect that the defendant drove so erratically on the way home, the plaintiff grabbed the keys and stopped the car, and another couple got out of their car and continued on home with some parties following them. However, she continued on with the defendant and again the car was stopped because of the erratic driving of the defendant. In any event, the evening ended up by the couple returning to their home. The most that can be said of the defendant in these two incidents is that his conduct may have been unwise, and perhaps impulsive, responding to the suspicions as to improper relations between the plaintiff and Oltman. No substantial inference can be drawn from the evidence that the impact of these two specific incidents caused the plaintiff any particular anguish, or harm, or interfered with the marital relations any more than the other numerous arguments and discussions that they had concerning her conduct with Oltman. Summarizing all of the evidence of the plaintiff, it consists of recitals of the plaintiff as to isolated incidents, many of them entirely uncorroborated, and none of them reaching the level of the quality of the evidence necessary to sustain a finding of extreme cruelty. The trial judge came to this conclusion, and we agree.

Turning now to the defendant's testimony, he testified substantially that he and his wife got along well in their marriage relationship until the summer of 1961. They bought a new car. He was making good money, outside of the farming operation, working for Oltman and making about $100 per week. About August 1961, the wife seemed to lose interest in the home, the children, and the marriage relationship. The children were left for long periods of time with relatives or the neighbors. The plaintiff, during the daytime, had almost the exclusive use of the new black and white Chevrolet automobile. Oltman visited the home and was inside

the house with the plaintiff at different times. This testimony was corroborated by the Novotnys, the neighbors living about a block away. The plaintiff refused to give an explanation for the large amounts of gasoline used in the new automobile, or the quantity of mileage it was driven, which incited the suspicions of the defendant. In any event, and as a result of their difficulty, the plaintiff left the home on approximately the 30th day of October 1961, moved to the city of Grand Island, Nebraska, became employed, and was living in a two-room apartment in a rooming house, consisting of a kitchenette and combination living room-bedroom. The significant part of the testimony on behalf of the defendant in this case comes from a Mr. Thorvald Jacobsen, an independent witness. He testified that he had been acquainted with the defendant all of the defendant's life and that he was acquainted with the plaintiff. On August 9, 1961, he was examining some property owned by him approximately 10 miles north of the place where he lived in the vicinity of St. Paul, Nebraska. He was in the company of his son inspecting some land. An automobile was parked on his land which he first discovered from the use of binoculars. Jacobsen and his son drove up to this automobile on his land, got out of the car, and approached. The car was a black 1961 Chevrolet Bel-Air automobile with a white top, an identical model with the one the defendant and the plaintiff purchased earlier in 1961. He identified this automobile as having license No. 49-2753, the license of the plaintiff and defendant's black 1961 Chevrolet Bel-Air automobile with a white top. Outside of the car, there were two empty pop bottles, an empty whiskey bottle, and several cigarettes. When he came up to the automobile, there were two people in the back seat of the car. As he walked up, he could see no one in the car, but as he approached two people sat up, and he identified the plaintiff, whom he had known, and stated she was in the process of pulling up her slacks and tucking

in her blouse. This witness testified that the man in the car made no response to his inquiry, except asking him if he owned the land. He testified that he warned them about the danger of cigarettes and the burning of the grass on his land, and then left. Later on, in the company of the defendant and a cousin of the plaintiff, he made a trip to Loup City, Nebraska, and positively identified the man in the car as being Mr. Ed Oltman. There is considerable detail as to the development of this testimony. Suffice to say, the testimony of this independent witness is convincing and persuasive as to definite misconduct on the part of the plaintiff.

The overall picture in this case is one of harmony until August 1961. There is a mass of testimony in the record, much of which is conflicting, and many statements, on the part of both the plaintiff and defendant, are uncorroborated. The testimony as to the incident of August 9, 1961, is convincing and persuasive as to misconduct. The district court observed and heard the witnesses and was in a favorable position to recognize merit, or lack of merit, of conflicting statements on the part of the witnesses. The determination of the reliability of these witnesses depends much on the trial court's observation, and the conclusions of the trial court as to the reliability of such testimony will be carefully regarded by this court. Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361; Killip v. Killip, 156 Neb. 573, 57 N. W. 2d 147. We hold that the decision of the trial court with respect to issues of cruelty was correct.

The trial court determined that the custody of the children should be with the defendant. The applicable rule is stated in Swanson v. Swanson, 137 Neb. 699, 290 N. W. 908: "To determine who should have the care and custody of the children, the court will always consider their best interests and welfare. There is no duty more delicate or responsible given to any court. At times it is most difficult, but if the decree of the trial court is justified by the evidence, its discretion will ordi-

narily not be disturbed. * * * The trial judge had the best opportunity to judge what was for the best interests and welfare of these three minor children and he placed them in the custody of the father, subject to his further order. The record discloses no better solution. The welfare of these children demands the highest consideration of the court and not the desires of the parents."

The evidence shows that until the beginning of the affair with Oltman, the plaintiff was a good mother. It also shows a marked difference in plaintiff's attitude and conduct in this respect beginning in the summer of 1961. There is persuasive evidence that continuously over this period of time, she left the children with relatives and neighbors for considerable lengths of time. The evidence is undisputed that the defendant is doing an efficient job of taking care of the children; and that the plaintiff left the home, has moved to Grand Island, Nebraska, is now working as a saleslady, and is occupying a small second floor apartment. The record in this case reveals consultation by the trial judge with the two children, ages 10 and 7.

While we recognize that ordinarily in this situation, the best interests of the children require that they be given into the care and custody of the mother, under these circumstances, we feel that it is apparent that the best interests of the children require that their custody be given to the father. The only alternative plan offered the trial court was taking these children from the family home and moving them to a new and strange environment in a second floor apartment in the downtown section of Grand Island, Nebraska. The comparative inadequacies and instability of the prospective home for these children, especially in comparison with their present situation, is apparent. The criterion is the best interests of the children and not the possessive desires of either one of the parents. We hold that the trial court was correct in making this disposition of the custody of the children.

The plaintiff challenges, as inadequate, the alimony granted to her in the amount of $3,000 of which $500 is payable on or before June 1, 1962, and $500 on December 31 of each year until the full amount has been paid without interest. The proper rule in determining alimony and division of property is not in dispute in this case; therefore, we will not repeat it here. Ivins v. Ivins, 171 Neb. 838, 108 N. W. 2d 99; Kinch v. Kinch, 168 Neb. 110, 95 N. W. 2d 319.

The articles of property owned by the parties are not in dispute. They are all personal and appear in exhibit 3 in the bill of exceptions. They consist of livestock, farm machinery, crops, and motor vehicles ordinarily associated with a farming operation. The plaintiff testified that exhibit 3 was prepared by herself, her father, and her attorney. There is no specific testimony as to the valuation of these items. The only testimony on behalf of the plaintiff was generally that the amounts listed in exhibit 3 are a proper valuation. There is no independent testimony. The defendant's testimony, in effect, is in agreement as to the items of property that they have. He testifies specifically and without contradiction as to the reduced valuation of certain items and that some of the items of crops have been used up in the feeding of the livestock. In this condition of the record, the trial court found the gross valuation of personal property of the parties was $13,517 subject to an indebtedness of $5,632 or net personal property assets, excluding household goods and furniture, of $7,885. The parties have been married since 1948, and it is undisputed that the accumulation of property was due to their joint efforts. The plaintiff, in her argument, merely asserts, after quoting the general rule as to the factors involved, that the division is not equitable and just. She asserts no particular error of the trial court in this respect, either as to valuation or the failure to consider any of the elements that should be taken into consideration. Her assertion is apparently

based upon the assumption that exhibit 3, prepared by her, her father, and her attorney, should be taken at face value. The trial court had a right to make an independent determination of valuation, and we are unable to find any error in the trial court's holding in this respect. We come to the conclusion that the award of $3,000 out of a net valuation of $7,885 is a fair and reasonable one.

The next question presented is the defendant's cross-appeal by which he asserts that the evidence was conclusive that the plaintiff herein was guilty of adultery and that she is not entitled to an award of alimony or attorney's fees. Baker v. Baker, 166 Neb. 306, 89 N. W. 2d 35. The defendant does not allege adultery in his amended cross-petition. There is no appropriate pleading on which to justify such finding, the trial court did not make such finding, and we find no reason to disturb that conclusion.

The plaintiff also asserts the inadequacy of the allowance for attorney's fees in the trial court. We feel that the allowance was not adequate. We allow an additional fee for services of plaintiff's attorney in the trial court in the sum of $100.

The judgment of the trial court in all respects is affirmed with the exception of the allowance of the attorney's fee. The judgment is, therefore, affirmed as modified.

AFFIRMED AS MODIFIED.

MAMIE ROOT ET AL., APPELLEES, V. MORNING VIEW CEMETERY ASSOCIATION, A CORPORATION, ET AL., APPELLANTS.
119 N. W. 2d 696

Filed February 15, 1963. No. 35280.

SUPPLEMENTAL OPINION

Appeal from the district court for Lincoln County:

CLARENCE S. BECK, Judge. On motion for rehearing. See *ante* p. 438, 118 N. W. 2d 633, for original opinion. Motion for rehearing denied. Reversed and dismissed.

Donald H. Kelley, Wilson & Barlow, and Hollman & McCarthy, for appellants.

Beatty, Clarke, Murphy, Morgan, Pederson & Piccolo, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This case came before the court on a motion for rehearing. The last paragraph of the opinion which was adopted is as follows:

"The judgment of the district court is reversed and the cause remanded."

Substituted for this paragraph for all of the purposes of the opinion is the following:

"The judgment of the district court is reversed and the cause dismissed."

With this substitution the motion for rehearing is denied.

REVERSED AND DISMISSED.

CARTER, J., dissenting.

I respectfully dissent from that part of the supplemental opinion dismissing the action. I agree that the judgment is not sustained by the evidence and should be reversed.

The action involves the disposition of the remainder of the estate of the testatrix by the residuary clause of her will. Testatrix made the cemetery association her residuary legatee. The amount of the residuary estate was stipulated to be between $260,000 and $270,000. The heirs of testatrix contend that $25,000 is all that can be reasonably used in carrying out the statutory purposes of the cemetery association and that the balance of the legacy is void as being against public policy.

The heirs submitted evidence as to the small size of the cemetery, its location in a sparsely settled area, the general condition of the cemetery, the amounts expended for maintenance and care which were from $230 to $637.69 for each of the preceding 7 years, the funds on hand in the amount of $1,709.35, the number of lots unsold, the number of burials per year which averaged 8, and other evidence, similar in nature, indicating little need for funds.

As a defense, the association produced evidence of needed improvements to the cemetery which included estimates of the cost of purchasing additional land, a pump irrigation system, ornamental fencing, ornamental gates, a one-story administration building with full basement, landscaping, paving, water and sewage, seeding, trees and flowers, labor, and other minor needs. The estimates submitted for these improvements totalled $102,305.28. There was no evidence that these estimates were reasonable in amount. There was no evidence that these proposed improvements were reasonably needed by the association under all the circumstances shown. There was no evidence of the cost of maintenance and perpetual care other than the testimony of the president of the association that it would cost $4,000 a year for a permanent caretaker.

At the close of defendants' evidence the heirs moved for judgment in accordance with the prayer of their petition. The trial court sustained the motion and directed that $35,000 be given the association and the balance be paid to the heirs of the testatrix. The dismissal of the action by this court is based on the conclusion of the majority that the heirs submitted their entire case at the close of defendants' evidence. I submit that this is not so. The record shows that during the course of the argument on the motion for judgment at the close of defendants' evidence and in response to an inquiry by the trial court, counsel for the heirs stated: "I think the procedure would be that if the mo-

tion were overruled, we would go ahead with our evidence, if we had any; but we feel there is nothing here that calls on us to rebut anything, because there is no competent evidence in the record here to sustain any amount." The motion for judgment being sustained, the trial was terminated. The statement made by counsel in arguing the motion for judgment was not a submission of the whole case on its merits. There is nothing to indicate an intention to submit anything more than the motion for judgment at the close of defendants' evidence for the ruling of the court. There is nothing that even resembles a "rest" by the heirs that would preclude the submission of rebuttal evidence. The heirs, upon a reversal, are entitled to produce rebuttal evidence under the following rule: "If, on appeal, it is determined that the trial court erroneously sustained either a demurrer to the evidence or a motion to dismiss, both parties are entitled to be placed in the same position they were in before the error occurred." Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912. I submit that the heirs, by this court's erroneous dismissal of the action, have been deprived of the right to show the unreasonableness of the association's evidence, a right which if exercised, could well change the result of the litigation.

We are here dealing with a noncharitable association with limited statutory powers. The rule generally is that such an association organized for a specified purpose and having limited statutory powers may benefit from a bequest, legacy, or devise to the extent that it can be put to a reasonable use within the purposes and powers of the association, and any amount over that which can be reasonably used cannot be accepted as a matter of public policy.

Our opinion does not hold that the evidence shows that the rule of public policy, recognized by the opinion, has not been violated. It simply holds that the evidence does not show that it has. By the present disposition of the case the court bars the heirs from producing the

evidence which our opinion holds was fatally absent from the record. After permitting the association to present its evidence, the effect of the dismissal is to deny the heirs the right to refute the evidence of the association, the only evidence purporting to sustain the testamentary gift as not being in violation of public policy.

I submit that the dismissal denies the heirs the fundamental right to rebut the evidence of the association. It violates the holding of this court in Peterson v. Massey, *supra*. It denies the right of the heirs to be heard on the theory of the case advanced by the cemetery association. Whether or not any part of the testamentary gift is void as being against public policy is a question of fact. By the distorted interpretation placed upon the argument of the heirs in support of their motion for judgment, which in my opinion the record nowise supports, the heirs are erroneously deprived of their right to meet the evidence of the association which goes to the very heart of the lawsuit. The error is a grievous one that violates every principle of justice and right. I submit that the judgment should be reversed and the cause remanded for further proceedings.

IN RE APPLICATION OF MIDWEST MAIL SERVICE, INC. MIDWEST MAIL SERVICE, INC., APPELLEE, V. BANKERS DISPATCH CORPORATION, APPELLANT.
119 N. W. 2d 692

Filed February 15, 1963. No. 35294.

1. **Motor Carriers.** In considering an application for a permit to operate as a contract carrier the burden is upon the applicant to show that the proposed service is specialized and fits the need of proposed contracting shippers.
2. ———. Where the evidence shows that the purpose of the applicant is to transport designated commodities for the general public, even though the service offered is limited or specialized,

it tends to support factors indicative of a common carrier and not that of a contract carrier.

3. ———. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers a need for contract carriers is not established.

4. ———. The grant of a permit to a contract carrier to render specialized service for proposed shippers may rest on a future need as well as an existing one, but such future need must be shown by evidence that is reasonably certain. It may not rest solely on speculation and conjecture.

Appeal from the Nebraska State Railway Commission. Reversed.

Robert E. Powell, for appellant.

Viren & Emmert, C. J. Burrill, and K. Edward Wolcott, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an appeal from an order of the Nebraska State Railway Commission authorizing Midwest Mail Service, Inc., Omaha, Nebraska, to engage in operation as a contract carrier by motor vehicle to transport "U. S. Mail, U. S. Parcel Post, non-negotiable instruments, documents, commercial papers, cash letters, deposit slips, checks accounting, tabulating and computing machine forms, records, and housing units containing such forms or records, loose, or in parcels, packages, and other containers, for the accounts of banks, banking institutions, savings and loan associations wholesale and retail establishments, under individual bilateral contracts, in writing between applicant and subscribers to its specialized expedited messenger service, on an 'exclusive-use-of-vehicle' basis, and/or regular, irregular scheduled or nonscheduled basis to, from and/or between points and places in the State of Nebraska. RESTRICTION: Service herein proposed will be limited to articles, parcels or packages above described, and incidental to or used in

connection with personalized and expedited accounting services, none of which exceed 100 pounds in weight."

Many common carrier objectors entered their appearances in opposition to the grant of the permit. All except Bankers Dispatch Corporation withdrew their objections when the restriction limiting the application was agreed to by the applicant. The Bankers Dispatch Corporation resisted the grant of a permit by the commission and, when the application was granted, appealed to this court. It is the contention of Bankers Dispatch Corporation that the order of the commission granting the application is not supported by evidence and is therefore unreasonable and arbitrary.

The applicant, whom we shall refer to as Midwest, was organized in June 1961. It engaged in handling mail for the convenience of its customers. It also engaged in the delivery of packages and parcels to bus stations and airlines and the transfer of interoffice and interplant merchandise and packages. This operation was within the city of Omaha or within a radius of 5 miles beyond its corporate limits. This was properly done without authority of the commission, which has no jurisdiction within such area. § 75-224, R. R. S. 1943.

The purpose of the application in the present case is to obtain a contract-carrier permit to transport the articles designated in the granted permit to and from all points in Nebraska over regular and irregular routes. A contract carrier by motor carrier has been generally defined by this court as one who furnishes transportation service to meet the special needs of specified shippers, which cannot be adequately provided by common carriers. It is the duty of the commission to weigh the special needs of shippers desiring contract carrier service against the adequacy of the existing common carrier service. The effect on a protesting carrier of a grant of the application and the effect on shippers of a denial are factors to be weighed in determining if the grant of the application would be consistent with the public in-

terest. Hagen Truck Lines, Inc. v. Ross, *ante* p. 646, 119 N. W. 2d 76. See, also, Rodgers v. Nebraska State Railway Commission, 134 Neb. 832, 279 N. W. 800.

There is no evidence in the record on the part of any shipper or prospective shipper of any need for a specialized service. There is no evidence by any shipper that he will contract with the applicant if the permit is granted. There is no evidence by any such shipper that existing common carrier service is inadequate to provide the service it needs. The applicant relies upon two witnesses to establish the need for specialized service. We shall briefly review their testimony.

Claude J. Ford is a vice president of Systemation Incorporated, which was organized in May 1961 with its principal place of business in Omaha. The business was established for the purpose of engaging in the processing of business source records in which the transportation of basic data and the finished product to and from the customer and the service center is an important consideration from the standpoint of time used and schedules employed. The witness testified that he was interested only in the above factors, regardless of who performed it. He had made no investigation of existing transportation services, although he knew such services existed. At the time he testified he had no customers outside of Omaha. He had no information as to the terms of any contract offered by the applicant and stated that he would not use the proposed service of the applicant unless its contract terms were acceptable. He also stated that, if there was an existing common carrier service in existence, he would be willing to use such service.

Thomas J. Nolan testified that he was a systems specialist engaged in advising his clientele on methods and procedures of handling their particular problems in keeping books, accounts, billings, and other records. This includes consultations regarding the use of modern equipment for processing source data into usable and

functional information in a minimum period of time. The cost of processing source data is prohibitive in most business organizations, which necessitates its transportation to and from processing centers for prompt handling. The service offered by the applicant is the type required to meet the needs of businesses that rely upon these processing centers. The witness testified that he could make no use of applicant's service as he performs his work at the place of business of his client. His testimony is that the processing center is a new development which will in time be of great use to businesses throughout the state. There is little such handling by businesses outstate at the present time and consequently little if any demand for it now exists.

The protestant, whom we shall refer to as Dispatch, holds interstate and intrastate certificates as a common carrier for the transportation of commercial papers, documents, and written instruments as are used in the conduct and operation of banks and banking institutions between all points in Nebraska over irregular routes. It now has authority to transport many of the items listed in the permit granted to the applicant and, when a demand or need for additional service arises, it will seek an extension of its authority in order to provide such service. It had received no requests for specialized service outside the scope of its authority prior to the hearing before the commission. Dispatch operates in several states other than Nebraska. It maintains three vehicles in Nebraska for the handling of its business, two of them stationed in Omaha and one in Lincoln. It secured its certificate and established its business in Nebraska in 1959 when it invested its funds and proceeded to build up its business. It now asserts that, after pioneering the business and building it to a profit-making operation, it would be very detrimental to Dispatch to permit the applicant to enter the field. Dispatch has authority to provide service to and from processing centers for banks and banking institutions any-

where in Nebraska and stands ready to provide such service to others if and when the need arises.

In considering an application for a permit to operate as a contract carrier the burden is upon the applicant to show that the proposed service is specialized and fits the needs of the proposed contracting shippers. Hagen Truck Lines, Inc. v. Ross, *supra*. A contract carrier ordinarily operates to perform specialized service for specified shippers to meet their peculiar needs that cannot be performed by a common carrier.

The evidence fails to show any existing need for the contract carrier service applied for. No shipper, or potential shipper, testified to any need for a specialized service. There is no evidence that the service provided by existing common carriers was in anywise inadequate. The applicant has failed to produce a single shipper, or potential shipper, who would testify that the specialized service applied for is needed and that it will, if the application is granted, contract with the applicant for the carriage of articles designated in its application. The necessary elements to support a contract carrier permit are not supported by evidence.

The fact that the proposed service will be used by a limited class of persons or businesses is not a controlling factor. Many services rendered by common carriers are limited or specialized, depending upon the nature of the industry being served. It seems clear to us that applicant desires authority to transport the designated articles for the general needs of all shippers. These are factors indicating a common carrier service and not that of a contract carrier. Even though applicant purports to transport only a limited number of articles for a limited number of businesses who alone have occasion to transport them, the evidence indicates that applicant intends to hold itself out to perform transportation service for all shippers of articles named in the permit. Such operations are those of a common carrier. State ex rel. Winnett v. Union Stock Yards Co., 81 Neb. 67,

115 N. W. 627; Zajic v. Johnson, 126 Neb. 191, 253 N. W. 77. We conclude that the proposed operation is that of a common carrier and, if authority to perform it is to be authorized, the applicant must show that it is required by public convenience and necessity.

The applicant argues that the grant of a permit to a contract carrier may be based on a future need as well as a present existing need. We quite agree that the commission is not required to wait until a transportation need becomes critical before taking action in the public interest. But such action must be based upon some reasonable evidence that a future need will shortly arise. It cannot be based solely on speculation and conjecture, even though absolute certainty is not required. In Richling v. Transit, Inc., 154 Neb. 108, 47 N. W. 2d 413, we said: "Furthermore, the statute requires that the finding that applicant is fit, willing and able to perform the proposed service, and that such service is or will be required by the present or future public convenience and necessity, must be sustained by evidence showing the granting of the certificate was not arbitrary or unreasonable." In Chicago & N. W. Ry. Co. v. Save the Trains Assn., 167 Neb. 61, 91 N. W. 2d 312, we said: "When the people of this state entrusted the regulation of public utilities to the railway commission, they did not grant it a power that could be whimsically exercised. It was power that was to be exercised with reasonable promptness under law with a due regard to established facts."

We conclude that the grant of the contract carrier permit in the instant case is without support in the evidence. The order of the commission is therefore unreasonable, arbitrary, and of no force and effect.

REVERSED.

THOMAS W. SINGLES, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH RAILWAY EXPRESS AGENCY, INC., A CORPORATION, APPELLEE.
119 N. W. 2d 680

Filed February 15, 1963. No. 35325.

1. **Trial.** Instructions to a jury should be considered as a whole and if they fairly submit the case that is all the law requires.
2. **Negligence: Evidence.** In an action for damages by reason of alleged negligence of another, evidence as to the financial standing of the parties is inadmissible.
3. ———: ———. Where the defendant in a personal injury case makes no attempt to show the plaintiff is receiving a pension, it is not proper for the plaintiff to offer testimony showing he received a small and inadequate one.
4. **Appeal and Error.** If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case did not affect the result of the trial unfavorably to the party against whom it was received its reception must be considered prejudicial error.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded.

Crossman, Barton & Norris, for appellant.

Wear, Boland, Mullin & Walsh, McCormack & McCormack, and A. Lee Bloomingdale, for appellee Singles.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This is an action for personal injuries brought by the plaintiff and appellee Thomas W. Singles against the defendant and appellant Union Pacific Railroad Company, a corporation, in the district court for Douglas County, Nebraska. The Railway Express Agency, Inc., a corporation, was also made a defendant by reason of its right of subrogation because of payments to plaintiff under the Workmen's Compensation Act.

Thomas W. Singles will be designated herein as plaintiff and Union Pacific Railroad Company, a corporation,

as defendant, as they appeared in district court, and the Railway Express Agency, Inc., a corporation, will be referred to as the Express Agency.

Defendant in its second amended answer admitted that its employees were negligent in operating its switch engine on the occasion in its yards at Omaha, Nebraska, but denied the nature and extent of the plaintiff's alleged damages and injuries.

A trial to a jury resulted in a verdict and judgment for the plaintiff in the sum of $124,765. From an order overruling its motion for new trial the defendant has brought the matter to this court on appeal.

Plaintiff was injured while employed by the Express Agency when he attempted to step from a platform truck into an express car to assist in its being unloaded. As he did so defendant's switch crew negligently pushed another car into the express car causing plaintiff's foot to be caught between the platform truck and the express car, which car rested on the truck after the collision. Plaintiff's injuries were severe, resulting in the amputation of his foot and thereafter of a portion of his leg, other operations, and in long and extensive treatments.

This case was previously before this court in Singles v. Union P. R. R. Co., 173 Neb. 91, 112 N. W. 2d 752. We reversed the judgment and remanded the cause for new trial because of errors in the instructions of the trial court. In our previous opinion the injuries to the plaintiff, as well as the circumstances occasioning them, are more fully set forth and need not be further elaborated here.

The defendant assigns error to the trial court in refusing to give instruction No. 3 tendered by the defendant and in giving instruction No. 9 on its own motion; also that the court erred in overruling defendant's objections to a question asked plaintiff on his redirect examination in regard to pension benefits received by him and thereafter sustaining plaintiff's objections to

defendant's questions asked the plaintiff concerning this pension and its offer of proof in connection therewith; and erred in refusing to admit in evidence defendant's proffered exhibits Nos. 23 and 24. Instruction No. 3 tendered by the defendant reads as follows: "You are instructed that if you find from the evidence that the plaintiff will suffer pain and suffering in the future, any award for such future pain and suffering, must be reduced to its present worth or cash value as adequate allowance must be made for the earning power of money. In this connection you are entitled to consider the plaintiff's age and his probable life expectancy at the time of the trial."

It is apparent from the argument in defendant's brief with respect to this tendered instruction No. 3 and instruction No. 9, given by the court, that its objection is that the court failed to instruct the jury that it was entitled to consider the plaintiff's age and probable life expectancy in its determination of any future pain and suffering. It also contends that when the trial court received in evidence the tables of expectancy for a man 70 years of age, which was the plaintiff's age at the time of trial, it should have instructed the jury as to their possible application to the case at hand and that future pain and suffering was to be computed from the time of trial instead of the date of the injury. Instruction No. 9 first sets out the admissions of the defendant as to its negligence and states plaintiff is entitled to recover a verdict for the full amount of damages which the evidence shows with reasonable certainty plaintiff has sustained from the accident and no contention of error is directed to it. The remaining portion of this instruction which is objected to is as follows: "You are the sole judges of the amount of damages to which the plaintiff is entitled in this case. It is for you to assess the amount of the plaintiff's damages at such sum as will fairly and reasonably compensate him for any and all injury, pain, and suffering and loss which

the evidence shows with reasonable certainty proximately to have been caused by the admitted negligence of the defendant Union Pacific Railroad Company.

"You should consider what the evidence may show to be the pain and suffering, if any, so caused and the nature and extent of the same, and the impairment of the capacity, if any, of the plaintiff to earn money in the future, and the reasonable value of the time lost by the plaintiff, if any. You should also consider what the evidence may show with reference to any future pain and suffering, and if you find that the plaintiff will, with reasonable certainty, suffer pain and suffering in the future, you should evaluate such future pain and suffering and assess such an amount as will fairly and reasonably compensate him for such pain and suffering, reduced to its present worth."

Instructions to a jury should be considered as a whole and if they fairly submit the case that is all the law requires. Bryant v. Greene, 166 Neb. 520, 89 N. W. 2d 579. We should therefore consider the other instructions which are related to the question presented to us. Instruction No. 11 reads as follows: "You are instruction (sic) that in an action for damages for personal injuries, if such injuries are found to be permanent, tables of life expectancy and work-life expectancy are competent as bearing upon and tending to prove the expectancy of life and the expectancy of work-life, but are not conclusive. They are to be received and considered by the jury as any other evidence and subject to the same rules as to their weight and sufficiency as other testimony. They should be considered together with all other facts and circumstances bearing on the expected life expectancy and work-life expectancy of the plaintiff." Instruction No. 5 sets out the different elements of damages that the jury might find the plaintiff suffered from the evidence as follows: "Before the plaintiff can recover in this case the burden is upon him to prove by a preponderance of the evidence one or

more of the following: 1—The nature and extent of the injuries sustained by the plaintiff in said accident; 2—that plaintiff has suffered pain from said injuries; 3—that plaintiff will in the future suffer pain from said injuries; 4—that plaintiff has sustained loss of earnings in the past by reason of said injuries; 5—that plaintiff has sustained an impairment of his earning capacity in the future by reason of said injuries; 6—the monetary loss which plaintiff has sustained." Instruction No. 12 deals with lessening of earning capacity of the plaintiff separately and the method of computing diminished earning capacity in the future. It does not mention future pain and suffering. Instruction No. 13 sets out the method of determining the present worth of any award for future damages and gives an example of the application. It refers to any award for future damage without mentioning either future pain and suffering or future loss of earning power in particular. No objection is given to any of the instructions of the court except instruction No. 9.

In considering these instructions as hitherto set out it seems quite clear that pain and suffering that occurred in the past and any which might occur in the future are treated separately. In the court's instruction No. 5, the two elements of damage are separately numbered and treated. In its instruction No. 9, the first paragraph set out herein speaks of pain and suffering which the evidence shows with reasonable certainty *to have been caused.* (Emphasis supplied.) In the second paragraph it speaks first in regard to pain and suffering generally and in the last portion sets forth that if the jury finds the evidence may show with reasonable certainty pain and suffering in the future, it should evaluate it and assess such amount as will fairly and reasonably compensate the plaintiff therefor, *reduced to its present worth.* (Emphasis supplied.) We find the instructions as a whole separate the past and future element of damages to be assessed. Instruction No. 13 properly gives

the method of determining the present worth of any future damage involved and gives an example to follow and no objection is made to it. Under the circumstances, considering the instructions as a whole, the jury would certainly relate future pain and suffering to that which might occur after the trial. That is the plain meaning of the word "future." Also the jury was instructed on how to compute any damages which might occur in the future. The defendant tendered instruction No. 3, which though it properly states the law was not necessary in view of those given by the court. The plaintiff's age was in evidence. The tables of life expectancy for those 70 years of age and those 66 years were before the jury. These were the plaintiff's age at trial and on the occasion of the accident, respectively. We find no error in the instructions.

The next assignments of error relate to the reception over objection of testimony of the plaintiff on redirect examination by his counsel with respect to the pension plaintiff received from the express company and the trial court's ruling in excluding questions directed to the plaintiff by defendant's counsel on recross-examination immediately thereafter concerning the same matter. The evidence objected to, both as to the admission and exclusion, is contained in one portion of the bill of exceptions and we will set it out at this point herein: "Q. And you were either the second man or the third oldest man in the employ of the Railway Express Agency here; is that right? A. Yes, sir. Q. I asked if you received a pension. How much pension did you get from the Railway Express Agency? MR. BARTON: I object to that, Your Honor, as not material. THE COURT: It is overruled. A. What was the question? (Question read by the reporter) Q. (By Mr. Boland) How much pension do you get from the Railway Express Agency? A. I get $7.55 a month. MR. BOLAND: That is all. RECROSS-EXAMINATION. By MR. BARTON: Q. Now, Mr. Singles, you

don't want the jury to believe that that is your whole pension? MR. BOLAND: Now, Your Honor, I object to that for the reason that the inquiry is limited entirely to the Railway Express Agency. That was his question on cross-examination and my question on redirect examination, so any further inquiry is immaterial. THE COURT: Objection sustained. MR. BARTON: Comes now the defendant and offers to show that the plaintiff is currently receiving a pension in the amount of $184 per month. MR. BOLAND: We object to the offer for the reason that it doesn't reflect the facts and for the reason that counsel refers to benefits under the Railroad Retirement Act which is a matter to which the plaintiff contributes; and that, therefore, any inquiry in that regard for any benefits which are collateral, are received from a collateral source, are immaterial. THE COURT: Objection sustained."

Both the plaintiff and defendant cite many cases where courts of last resort have held that the introduction of evidence in a personal injury damage suit by a defendant as to a plaintiff receiving a pension is immaterial and inadmissible. They include a case from this court, being Harper v. Young, 139 Neb. 624, 298 N. W. 342. The briefs of both parties however state that the question is novel where such evidence is introduced on behalf of the injured plaintiff and no cases are cited construing the precise point before us. The defendant contends the admission in evidence of a very small and inadequate pension was prejudicial in that it indicated the plaintiff, long an employee of the express agency, had been in effect thrown into the street to exist on a niggardly pension. It asserts the introduction of such evidence could only be for the purpose of inciting the sympathy of the jury in the financial plight of the plaintiff; that particularly this is true where the court would not allow cross-examination as to the real amount received. The plaintiff, on the other hand, insists that the defendant usually offers such evidence in such cases in

the hope that the jury may reduce the verdict because of the existence of other income. He argues such testimony tends to mitigate the damage and claims in this case the introduction of evidence of even a small outside income would redound to the defendant's advantage in that the jury might give the defendant the benefit thereof. Plaintiff further contends that it was necessary that he be interrogated as to the receipt of the pension and the amount thereof in order to explain the questions previously asked on cross-examination by defendant's counsel. An examination of the previous cross-examination of the plaintiff reveals no questions whatever about his receiving a pension. The plaintiff on direct examination testified as to his working for the express agency for many years and as to his inability to do any work after the injury. He was thereafter on cross-examination asked if he had not been retired because of his age and not because of injury, and if he had not so testified under oath. These questions were asked and answered without objection and it would appear they were asked to explain the reason for his not working. We do not believe they may be said to be of a nature that would permit the plaintiff on redirect examination to give evidence of his pension and the amount thereof. Neither are we impressed by the argument of the plaintiff that this evidence would redound to defendant's benefit before a jury. The trifling nature of the amount received would have little effect on a jury in computing damages when compared with the sympathy it might elicit because of his apparent straightened financial plight. We think the case before us is somewhat analogous to the case of Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A. L. R. 642. There this court considered the effect of allowing a defendant to testify in an action for personal injuries received in an automobile accident that he had no insurance. There this court laid down the following rules: "In an action for damages by reason of alleged negligence of another,

evidence as to the financial standing of the parties is inadmissible.

"Where a plaintiff in a personal injury action makes no attempt to show that the defendant is indemnified from loss by an insurance company, it is not proper for the defendant to offer testimony showing that he is not indemnified by insurance."

In automobile personal injury cases it was hitherto generally the plaintiff who tried to show that the defendant had insurance. In the cited case the defendant attempted to prove he had no insurance undoubtedly with intent to incite sympathy at his financial predicament. The parties are reversed in the case before us but the principle is the same. In the present case we hold that where the defendant in a personal injury case makes no attempt to show the plaintiff is receiving a pension, it is not proper for the plaintiff to offer testimony showing he received a small and inadequate one.

Plaintiff contends that if the reception of this evidence was erroneous it was not prejudicial and should not be grounds for a reversal. In the case before us the defendant had admitted liability. The only issue before the jury was the amount of damages sustained by the plaintiff who had a severe injury as to which the plaintiff and his doctors testified at length. There was no occasion for the introduction of immaterial evidence which would only result in inciting the sympathy of the jury.

The verdict and judgment recovered were very substantial.

In State v. County of Cheyenne, 157 Neb. 533, 60 N. W. 2d 593, this court said: "If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case did not affect the result of the trial unfavorably to the party against whom it was received its reception must be considered prejudicial error."

Defendant claims the result was particularly prejudicial because of the denial by the trial court to allow it

to question the plaintiff on recross-examination in regard to the actual pension received by him. There is substantial authority to the effect that after one has succeeded in introducing immaterial and incompetent evidence on a subject the opposing party may cross-examine concerning it. See 98 C. J. S., Witnesses, § 378, p. 138, and 70 C. J., Witnesses, § 810, p. 642, where a considerable number of cases are cited. However, as this case must be retried because of the admission of this evidence by the plaintiff in the first instance, it is unnecessary for us to pass on that question.

Exhibit No. 23, sought to be admitted by defendant, was an unsigned copy of a letter, dated August 6, 1959, directed to the plaintiff from J. B. Freeman, head of the insurance bureau of the express company, whose name is printed thereon by typewriter, in which it states that plaintiff had been awarded an annuity by the Railroad Retirement Board of $176.20 per month; and that under the express company's plan he was entitled to $183.75, less the annuity under the retirement act, leaving him entitled to $7.55 a month.

Exhibit No. 24 was a copy of a letter to the general manager and six superintendents stating that the employees on an attached list were to be retired on becoming 65 years of age and the defendant's name, T. W. Singles, was listed thereon.

Both of these exhibits were excluded by the trial court and defendant contends their exclusion was erroneous. The copies were identified by the general agent who testified as to their being regularly kept in the files in his office at Omaha to which copies were sent in the regular course of business. They were sought to be admitted under the Uniform Business Records as Evidence Act, sections 25-12,108 to 25-12,111, R. R. S. 1943. As far as exhibit No. 23 is concerned it disclosed the true pension that the plaintiff received. The question of whether this exhibit was admissible at the trial in the district court is not necessary for us to decide.

Exhibit No. 24 relates to the plaintiff being retired because of age. He had admitted this previously on cross-examination. Under the circumstances, it was not necessary again to re-emphasize the retirement by introducing further evidence. Whether or not exhibits Nos. 23 and 24 were admissible as a record kept as provided under the Uniform Business Records as Evidence Act, sections 25-12,108 to 25-12,111, R. R. S. 1943, is not decided.

A retrial of this action appears necessary and at a subsequent trial all questions in regard to a pension received by the plaintiff must be excluded.

Because of a prejudicial error in receiving testimony of the plaintiff, this case must be and is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SIMMONS, C. J., not participating.

MERRILL W. WILLAN, APPELLANT, V. WALLACE B. FARRAR ET AL., APPELLEES.
119 N. W. 2d 686

Filed February 15, 1963. No. 35336.

1. **Mines and Minerals.** An oil and gas lease, providing that, unless work is commenced by a certain time, or unless the lessee pay a rental stated to renew the lease, it shall terminate, confers an optional right upon the lessee and should be strictly construed in favor of the lessor and against the lessee.
2. ———. Such a delay rental clause is a special limitation, time is of the essence of the contract, and failure of the lessee or his assigns to tender or pay rentals within the specified time automatically terminates the lease without any affirmative action by the lessor, or anyone else, for that purpose.
3. ———. Where an "unless" lessor accepts delay rentals after the time specified for payment in the lease or retains the payment for an unreasonable time before returning it, he thereby waives strict performance and is estopped to claim termination of the lease.

4. **Equity.** Courts of equity should be extremely reluctant to effect forfeitures.
5. **Bills and Notes: Mines and Minerals.** Where a personal check has been accepted by a lessor, the lessor is obligated to present the check for payment and cannot declare the lease terminated unless payment is refused.

Appeal from the district court for Grant County: DONALD H. WEAVER, Judge. Reversed and remanded.

Van Steenberg, Myers & Burke, for appellant.

Reddish, Fiebig & Curtiss, Gantz, Hein & Moran, and Duane L. Mehrens, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action to quiet title to three oil and gas leases. After a trial, the court dismissed the action. When his motion for a new trial was overruled, plaintiff perfected his appeal to this court.

The plaintiff is Merrill W. Willan, who will hereinafter be referred to as Willan. The defendants are Wallace B. Farrar and Helen Farrar, husband and wife, and Hemisphere Oil Company, a corporation. Wallace B. Farrar will be hereinafter referred to as Farrar, and Wallace B. and Helen Farrar will be referred to as Farrars. Hemisphere Oil Company will be referred to as Hemisphere. W. Bonner Brice, who is president of the Hemisphere Oil Company and the owner of 99 percent of its stock, will be hereinafter referred to as Brice.

Willan, who did business under the trade name of Sandhills Petroleum Company, was the lessee in three oil and gas leases covering more than 22,000 acres, which it is not necessary to describe herein, owned by the Farrars. The leases had a terminal date of June 15, 1961, unless drilling operations were commenced or delay rentals were paid on or before that date. No drilling operations were ever commenced. In April

1961, Brice, for Hemisphere, secured leases from the Farrars on the same property, with the understanding that they would be valid only if the Willan leases were terminated because of failure to pay the delay rentals. It should be noted that Willan acquired his interest in the leases by assignment from Brice and Company, a predecessor of Hemisphere, for $28,569.61, and that Brice at all times was fully informed of the status of the Willan leases. Hemisphere's rights are entirely dependent upon the validity of the Willan leases, and they are active participants in this litigation.

On June 13, 1961, 2 days before the termination of the leases, Willan visited with Farrar in Ogallala, Nebraska, about a 30-day extension for the payment of the delay rentals. Farrar refused to grant a 30-day extension, but did grant one for 10 days. Willan wanted the extension in writing and prepared a sight draft in duplicate, drawn on himself in care of the Bank of Hyannis, Hyannis, Nebraska, which Farrar signed as drawer. The draft provided that it was payment in full, when paid, for the lease rentals. A description of the property leased was attached to the draft. One copy was mailed to the Bank of Hyannis and was received by the bank on June 14, 1961.

On Sunday, June 25, 1961, Willan went to Hyannis, Nebraska, and attempted to locate W. D. Stroud, the executive vice president and cashier of the Bank of Hyannis. Being unable to do so, he went to the Farrar ranch where he made out and delivered to Farrar his personal check drawn upon The Central Bank & Trust Co., Denver, Colorado, for $11,335. The testimony of Willan on this point is as follows: "Q. Will you relate your discussion with Mr. Farrar, please? * * * A. We visited about the weather. There was a storm building up back in the northwest, and a normal friendly visit. I told him I was there to take care of the sight draft; that I stopped and couldn't locate Mr. Stroud, and brought the check on down to him. Q. Handing you

what the court reporter has marked Exhibit 30, please identify it. A. That's the check that I gave him on the 25th of June. Q. Where did you give Mr. Farrar this check? A. There's kind of a retaining wall used both as a bench and desk where we were visiting and I laid it down on the wall there beside Mr. Farrar. Q. Then what happened to the check? A. Well, he mentioned that Mr. Brice was coming in the following day and that maybe I should contact him to explain what happened, and I said that was agreeable with me so he picked up the check and he and I walked in the house. I tried to call Mr. Brice in Denver but we couldn't get through so I went on into Ogallala and called him and talked to him from there. * * * Q. What did you do? Was there any discussion with Mr. Farrar about the check at that time? A. He said he didn't know whether he should take it or not. I said, Wally, you and I are the ones doing business and under the terms of it, it can be paid to the bank at Hyannis or can be paid to you, so I am considering it payment to you. Q. What did you do then? A. Like I said, went into Ogallala and called Mr. Brice and told him, as usual, just under the wire; stopped and delivered the check to Mr. Farrar. He thanked me for saving he and his associates a trip up the following day. Q. Was there any discussion between you and Mr. Farrar about you returning to Hyannis the following day? A. Yes, I told him I would be there if Mr. Brice was coming up. Q. Were you there? A. No, sir. Q. Why weren't you there? A. Mr. Brice indicated he wasn't coming."

Farrar's testimony relative to this transaction is as follows: "Q. Did Mr. Willan contact you again after you signed this draft during the month of June 1961? A. Yes, sir. Q. Where was that contact made? A. At the ranch. Q. By the ranch, you mean your ranch in Grant County? A. Yes, sir. Q. Could you tell us what day that was? A. It was Sunday, June 25th. Q. 1961? A. 1961. Q. Where did you first see Mr. Willan

that day? A. Out in the yard. Q. Had he called you prior to that time by phone or made other contact? A. No, sir. Q. What did he say to you in your yard the afternoon of June 25th, 1961? A. Well, he — when he gave me the check for the lease — Q. I hand you what the reporter has marked Exhibit 30 and ask if you have seen that before? A. Yes. Q. When was the first time you saw that? A. June 25th, 1961. Q. Where was that? A. At the ranch. Q. Is that the check you referred to, he wanted to give you a check to pay the lease? A. Yes, sir. Q. Did he hand that check to you? A. Yes. Q. What did you do with it? A. I laid it on the wall where we were visiting. Q. This was outdoors? A. Outdoors. Q. Did you make any statement to him concerning the check? A. Yes; I told him I didn't want the check; it should be paid at the bank. Q. Did he make any response to that? A. This was a Sunday. Q. Is that all he said about it, it was Sunday? A. I don't remember. I told him I thought he was to pay the bank. I wasn't supposed to take the check. The bank done the business. Q. What did you do then? A. Well, we went into the house. Q. Was there any conversation about why you were going in the house? A. Yes, I told him he ought to talk to Mr. Brice as he wanted to know if Mr. Willan had paid his rental and I said I didn't know. I told him he should call Mr. Brice and talk it out with him. Q. What was done with the check when you went in the house? A. I laid it on the kitchen table. Q. Who took it in the house? A. I did. Q. Did Mr. Willan call Mr. Brice in your presence in your house? A. He tried to get him. * * * Q. What did you then do with the check? A. I brought it into the bank Monday morning."

The next morning, June 26, 1961, Farrar and Brice went to the Bank of Hyannis where they met with W. D. Stroud who had the sight draft drawn June 13, 1961. Stroud looked at Willan's check which Farrar gave to him. He refused to accept it as payment of the sight

draft and handed it back to Farrar. He also wrote "Rtd Unpaid" on the sight draft and gave the sight draft to Farrar.

Sometime on June 26, 1961, Brice drew up affidavits for the signatures of the Farrars, stating that the delay rentals provided for in the Willan leases had not been paid and that no extension had been granted. These were filed for record on June 27, 1961.

On or about the first of July 1961, Willan received the following letter from attorneys representing the Farrars:

"June 27, 1961

"Mr. M. W. Willan
2116 Canyon Lake Drive
Rapid City, South Dakota
"Dear Mr. Willan: Re: Wally Farrar

"Wally handed me your check dated June 25, 1961 for $11,335.00. He does not consider this check performance of the 10-day extension he gave you on the delay rental date. The draft you had sent him named Bank of Hyannis as both forwarding and collecting bank. Under the draft, as well as under the lease, the delay rental had to be paid into the bank. This was not done within either the period of the lease or the draft. Mr. Stroud sent notice of the collection item to you in Rapid City, but it was returned marked insufficient address.

"Incidentally, Mr. Stroud called Central Bank and Trust Company Monday morning and was advised there were not sufficient funds in the bank at the time of the call.

"Wally indicated that he was reluctant to do this, but felt that he must because of the volatile nature of the oil activity in the Hyannis area at present.

"Please let us know if you have any questions.

"Yours very truly,
REDDISH & FIEBIG
By A. T. REDDISH (Sgd.)

ATR/lo
cc: Mr. W. D. Stroud
Mr. W. B. Farrar"

Willan's check was never presented for payment. Stroud testified that on June 26, 1961, he called the head bookkeeper at the Denver bank and was told the check would not clear, but no attempt was ever made to clear it through the bank on which it was drawn. Defendants also offered in evidence a ledger sheet for Willan in The Central Bank & Trust Co., Denver, Colorado, which indicated that sufficient funds were not on deposit in that bank account to clear the check until July 6, 1961.

The evidence is undisputed that in the early part of June 1961, Willan had made arrangements with the president of the American National Bank of Rapid City, South Dakota, for a credit of eleven thousand five hundred dollars. This was to be transferred from the account of the American National Bank of Rapid City with The Central Bank & Trust Co. of Denver, Colorado, when the Rapid City bank was notified the amount was needed to cover a check issued by Willan. The arrangement had been used before and was confirmed by the officer in the Denver bank who supervised Willan's account in that bank.

In Fritsche v. Turner, 133 Neb. 633, 276 N. W. 403, an early case dealing with a delay rental clause similar to the one involved herein, this court held: "An oil and gas lease, providing that, unless work is commenced by a certain time, or unless the lessee pay a rental stated to renew the lease, it shall terminate, confers an optional right upon the lessee and should be strictly construed in favor of the lessor and against the lessee."

In Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150, we held: "Such a delay rental clause is a special limitation, time is of the essence of the contract, and failure of the lessee or his assigns to tender or pay rentals within the specified time automatically terminates the lease without any affirmative action by the lessor, or any one else, for that purpose."

It is the position of the defendants that under these

authorities, the leases involved herein were automatically terminated on June 15, 1961. This would be true unless Farrar's action stayed the operation of the rule.

Paragraph 16 of the leases provides: "All rental payments which may fall due under this lease may be made to Wallace B. Farrar one of the above named lessors, in the manner herein stated."

On June 13, 1961, Willan prepared a sight draft on himself. This arrangement was accepted by Farrar by signing the draft 2 days before the termination date of June 15, 1961. The draft by its terms provided for payment within 12 days of its receipt by the Bank of Hyannis, or June 26, 1961. The check tendered to Farrar in payment was delivered June 25, 1961.

Defendants assert the invalidity of this extension on several grounds. Defendants contend that the statute of frauds is applicable. They argue that oil leases are chattels real; and that until severed, oil or minerals in the ground remain real estate. Fawn Lake Ranch Co. v. Cumbow, 102 Neb. 288, 167 N. W. 75. Their point is, the leases being estates upon special limitations terminating June 15, 1961, extension of the leases even for 10 days would be the granting of another estate upon a special limitation and not a mere extension of time within which to pay delay rentals, and would require an agreement in writing. We do not agree that an extension of 10 days for payment would require a written memorandum. The sight draft herein, however, did recite that it was in payment of the lease rentals and described the property.

A more serious contention is that Helen Farrar, who was a coowner of the real estate, did not sign the sight draft and is not bound by the extension granted by her husband. It is elementary that one cotenant cannot convey his cotenant's interest in real estate. Trowbridge v. Donner, 152 Neb. 206, 40 N. W. 2d 655. Willan's answer is that the leases, by their express terms, provided that payments could be made to Farrar, and

that payment to him would be compliance with the terms of the lease. Farrar accepted the sight draft as payment, and while it granted an extension, it was accepted as payment before June 15, 1961. It may be argued that a sight draft drawn by Farrar on the lessee is not the type of draft contemplated by paragraph 4, which provides: "All payments or tenders may be made by check or draft of lessee or any assignee thereof, mailed or delivered on or before the rental paying date." Helen Farrar did not testify, and there is nothing in the pleadings or the evidence indicating that she in any way disapproved of any of her husband's actions. The view we take on waiver, discussed hereinafter, however, makes the question of a valid extension immaterial.

Willan's position is that on June 25, 1961, Farrar accepted his check which was tendered as payment of the draft. The delay rental was $11,335. The sight draft was for $11,335. Willan's check was for $11,335, and was made payable to W. B. Farrar, who was designated by the leases as one to whom payment could be made. Whether it was in payment of the draft or the delay rental, tender was made and was accepted. When Farrar's attorney wrote Willan under date of June 27, 1961, the reason stated for the refusal to accept the check was that payment of the draft had to be made to the bank, and no other reason is given. The check, however, remained in either Farrar's or his attorney's possession until put in evidence herein. It was never presented for payment, and was never returned to Willan.

We determine that when Willan delivered the check to Farrar on June 25, 1961, Farrar's actions constituted an acceptance by him of the check. He did not refuse it or attempt to turn the check back, but kept it in his possession and took it to his bank with him the next morning. The most favorable construction that can be put on his testimony is that he reluctantly accepted the

check, but the fact remains that his conduct constituted an acceptance.

Defendants suggest the tender of a personal check does not constitute payment. The leases specifically authorized payment by personal check. The sight draft was drawn by Farrar and the check was payable to Farrar. Would anyone argue that the payment of the cash to Farrar would not have discharged the obligation? If we consider the check as payment of the sight draft, no question arises because it was tendered within the time specified for the payment of the sight draft. If, however, we ignore the sight draft, we are then met with defendants' argument that the check was not delivered to Farrar until June 25, 1961, or 10 days after the leases had automatically expired. Our law provides that "unless" leases expire automatically if payment is not made within the time specified. Valentine Oil Co. v. Powers, *supra.*

Willan seeks to avoid the operation of the rule of automatic termination in this case, on the theory that special circumstances require the application of general equitable powers of the court. There are many cases from other jurisdictions which, under a variety of circumstances, have held that equitable relief is applicable to prevent the automatic termination of an "unless" lease. These cases are set out in 3 Summers, Oil and Gas (Perm. Ed.), footnote 92, p. 131. Many of them involve the acceptance of delay rental payments after the date specified for payment. One more nearly in point with the instant case than some of the others is Cordell v. Enis, 162 Ark. 41, 257 S. W. 375, where the lessee mailed lessor a delay rental check 2 weeks after the due date, and the lessor retained the check for a week before returning it. The Arkansas court held that by retaining the check, the lessor had waived his right to insist on the automatic termination of the lease. Inasmuch as this specific point is one of first impression in this state, we believe these cases are more in harmony

with our holding on like situations in other fields.

As we said in State ex rel. Davis v. Farmers State Bank, 112 Neb. 597, 200 N. W. 173, courts of equity should be extremely reluctant to effect forfeitures. This is particularly so when the lessor could avoid any question by simply refusing to accept payment when tendered after the time specified.

We hold that where a personal check has been accepted by a lessor, the lessor is obligated to present the check for payment and cannot declare the lease terminated unless payment is refused.

We hold that where an "unless" lessor accepts delay rentals after the time specified for payment in the lease or retains the payment for an unreasonable time before returning it, he thereby waives strict performance and is estopped to claim termination of the lease.

Defendants further argue that the action should be dismissed because Willan has failed to make timely, proper, and continuous tender of the delay rentals, and because of his failure to make proper continuous tender in his pleadings. We have covered the question of timely and proper tender. When Farrar accepted Willan's personal check, he was obligated to present the check for payment. His failure to do so and his holding of the check constituted a continuous tender. Willan did tender the cash into court after judgment herein, and then he tendered in sufficient to cover the 1961 and 1962 delay rentals. In any event, as we said in Canaday v. Krueger, 156 Neb. 287, 56 N. W. 2d 123: "A formal tender is not necessary where a party has shown by act or word that it would not be accepted, if made, since the law does not require a useless formality."

For the reasons given, the judgment entered herein is reversed and the cause is remanded with directions to the court to set aside the order of dismissal and to enter an order quieting title in Merrill W. Willan in the three oil and gas leases involved herein.

REVERSED AND REMANDED.

IN RE APPLICATION OF CITY OF LINCOLN, NEBRASKA. ROLLIE JOHNSON ET AL., APPELLEES, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.

120 N. W. 2d 297

Filed March 1, 1963. No. 35219.

1. **Landlord and Tenant.** A lease is a species of contract for the possession and profits of land and tenements for a certain period of time, and the essential elements of a contract must be present.
2. ———. Whether an instrument is a lease or creates a relation other than that of lessor and lessee depends on the intention of the parties. The instrument is to be reasonably construed, and the practical construction given it by the parties thereto considered.
3. ———. An instrument may be given effect as a lease although the word "lease" is not used.
4. ———. The validity of a lease of real estate, and the bona fides of the relation of landlord and tenant created thereby, are in no manner affected by the provisions thereof merely determining that the amount of the rental shall be fixed at a definite percentage of the amount of income received by the tenant.
5. ———. A lease should contain a sufficiently accurate description of the property demised as clearly to indicate just what property is intended to be covered by the lease. However, no particular form of description is necessary; any description by which the identity of the leased property may be established is sufficient.
6. ———. In litigation over a lease, the parties concerned being fully acquainted with the premises, any uncertainty in description is cured by the introduction of record evidence describing the land.
7. **Constitutional Law: Landlord and Tenant.** A tenant for a term has a property right in land, which is protected by Article I, section 21, of the Constitution of Nebraska.
8. **Witnesses.** Where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation.
9. ———. The owner of personal property is qualified by reason of the ownership relation to give his estimate of the value of such property.
10. **Trial.** Whether a party may withdraw his rest and introduce further testimony rests within the sound discretion of the trial court.

Appeal from the district court for Lancaster County: JOHN L. POLK, Judge. Affirmed.

Ralph D. Nelson, Henry L. Holst, and Hal B. Hasselbalch, for appellant.

John McArthur, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The City of Lincoln, a municipal corporation, located in Lancaster County, brought a proceeding before the county judge of said county to acquire a temporary and permanent easement for sanitary sewer purposes. The petition of the City in the county court alleged that Rollie Johnson and Betty Johnson, his wife, purportedly had some interest in the property described in the petition, the true nature of which was unknown to the applicant. In the prayer of the petition the City prayed that all persons claiming any interest in or right to any of the premises described have notice of the proceeding, and that their right, title, and estate be bound and forever determined and concluded thereby. The appraisers appointed by the county judge awarded Rollie Johnson and Betty Johnson, his wife, no damages. Rollie Johnson and Betty Johnson, his wife, appealed to the district court.

For convenience we will refer to the City of Lincoln as the city, and to Rollie Johnson and Betty Johnson, his wife, as the plaintiffs, or when necessary by their right names.

The petition of the plaintiffs alleged that they were the defendants in the original proceeding and in possession of portions of Lots 17 and 24, Irregular Tracts in the southeast quarter of Section 7, Township 10 North, Range 7 East of the 6th P. M., in Lancaster County; that these plaintiffs had contracts and leases and a leasehold interest in and to a large portion of the land

over which the city sought to obtain a permanent and temporary easement; that the plaintiffs' leasehold interest and contract in a portion of the land considered covered an area which the plaintiffs had developed and completed as an addition to a trailer court located thereon except for the interference of the city; that in another portion of said land considered the plaintiffs had only partially completed the development and building of an addition to a trailer court therein; and that all of said land and the contracts and leases of the plaintiffs had been affected and would be affected by the easements which the city desired and which easements would damage the plaintiffs. The petition then set out the manner in which the plaintiffs would be damaged by the city by virtue of the obtaining of the easements heretofore mentioned. The prayer of the petition was for damages.

The city in its answer alleged that the city condemned the property described in the transcript filed with the petition. The city further alleged that the plaintiffs had no compensable interest in the property condemned, and the board of appraisers awarded the plaintiffs nothing for their alleged interest. The prayer of the answer was that the court dismiss the petition.

The case was tried to a jury resulting in a verdict in favor of the plaintiffs in the amount of $1,350. The city filed a motion for new trial which was overruled. The city perfected appeal to this court.

The city assigns as error that the trial court erred in not granting the city a directed verdict on grounds that the plaintiffs had not proved an interest in the land condemned and had not proved damages by competent and relevant evidence; that the trial court erred in allowing the plaintiffs to withdraw their rest and attempt to elicit additional evidence on issues which were the foundation of the city's motion for directed verdict; and that the verdict was not sustained by the evidence and was contrary to law.

The city moved for a directed verdict at the close of the plaintiffs' evidence, after the trial court had permitted the plaintiffs to withdraw their rest and introduce other evidence, and at the close of all of the evidence.

The city having attacked the sufficiency of the evidence, it is necessary to summarize the competent and material evidence.

The record discloses that Merril R. Reller is the owner of the real estate described in the pleadings known as Commercial Center; that this property is located just outside of the city limits of Lincoln, and consists of 120 acres with a frontage of approximately 2,700 feet; and that since his ownership of the property and prior thereto, it was used in part for mobile homes or house trailers.

Merril R. Reller testified that he and the plaintiffs determined to set up a more elaborate trailer court; that Rollie Johnson was an electrical engineer and knew about construction and building; that a contract was drawn up in which Rollie Johnson was to supervise the building of the trailer court and eventually it would be completed, then the Johnsons would manage the finished product; that the trailer court was first built in sections; that Rollie Johnson was in charge of the actual construction; and that prior to June 1960, about four sections had been built which would comprise about 160 or possibly 180 spaces. The Johnsons were in exclusive possession of this trailer court and had exclusive operation of it. As of June 1960, the next section of the trailer court was ready to be developed. The amount of land this section would cover was to be approximately 400 feet by 800 feet. It would accommodate 40 new trailer spaces, and have adequate parking and playground area. When this new development was in the making, Reller entered into a written contract with the plaintiffs, the plaintiffs were placed in possession of the land upon which the new section was to be built, and

operations were commenced. The land described in the contract is the same land that was actually crossed by the intercepter sewer built by the city. When the plaintiffs were put in possession of the land in June 1960, the plaintiffs built a well in the area to serve the trailers that were to be placed on this new section. They had grading done, the land was completely surveyed, piping and water was brought into the area, some ditching was done, and roads were built. This work was all done by the plaintiffs prior to the city showing any desire to obtain an easement or to cross the land with the intercepter sewer. The plaintiffs were in possession when the city commenced the condemnation proceedings, and were named as parties so their interests could be determined.

The contract between Merril R. Reller and the plaintiffs provided in part: "This agreement as to specifications and plans for an addition to the Center Trailer Court of a 40-trailer unit, said court being located at 4100 Cornhusker Highway, * * *.

"The size and location of the area will be 300 feet deep extending along the full north side of the present court. * * *

"Roadways to be of cement construction, * * *.

"Land area to be furnished by First Party (Reller) and money needed for construction to be furnished by * * * (Reller) as needed, not to exceed $40,000.00, that being the estimated cost of completing new area. Labor and management of construction to be furnished by Second Parties (Johnsons) and * * * (Johnsons) to keep adequate books of account * * *,

"Adequate insurance to be carried by * * * (Johnsons).

"Construction is to commence not later than August 15, 1960 and one-half of said lots are to be ready for occupancy by trailers by October 15, 1960 and the balance of said area to be finished by December 15, 1960."

The plaintiffs were to receive the full income from the new section of the trailer court for the period of 2 years

from and after completion of the new section. At the expiration of the 2 years the plaintiffs were to manage the court, keep the same in repair, keep all books of account, and to receive 50 percent of the proceeds for a period of 10 years. This agreement was signed and acknowledged by Reller and the plaintiffs on June 6, 1960.

The first notice Reller had that the city intended to cross the area where the Johnsons were to build the addition to the trailer court was in August or September 1960.

Merril R. Reller further testified that the going through with the intercepter sewer caused at least the trailer in one space to be moved off the lot because of the encroachment of the intercepter sewer easement, and this trailer space was rented; that for a period of 2 years the easement would be 100 feet wide and it was doubtful if that space could be restored; that the trailer spaces were filled at all times; and that the condemnation of the right-of-way by the city for the intercepter sewer, in the opinion of this witness, would make it impossible to use this area for the placing of the trailer court addition.

Certain exhibits were introduced in evidence showing the operation of the building of the intercepter sewer. There is also in evidence a blueprint or drawing of the Center Trailer Court showing the area referred to in the written agreement, an exhibit which shows the trailer court imposed upon a larger map of the Commercial Center and the adjacent area, and an aerial map of the Commercial Center showing the trailer court and the area referred to in the written agreement.

Merril R. Reller further testified that it would not be possible to build paved roads or any kind of permanent installations on this area where the city has the intercepter sewer easement for several years because the easement prohibits the building of any structures over it; that for a number of years there will be an instability

to this area that is some 50 feet wide that runs diagonally through this area causing settling; that the well that was on these premises must be a certain distance away from the sewer before it can be used; and that it would be hazardous to use the well in this vicinity for the use of human beings. Reller further testified that from his knowledge as owner of the Commercial Center, his interest as lessor of the trailer court, and as a person participating in the profits of it, the Johnsons' contract interest would create a loss to them in the amount of $12,000 to $16,000.

Merril R. Reller further testified on cross-examination that the Johnsons expended about $1,000 under the agreement, and were unable to complete any part of the trailer spaces due to the interference of the intercepter sewer line.

An expert witness who had appraised property for different concerns, both public and private, and who was the owner of a trailer court, testified that he operated a trailer park at 4020 North Forty-eighth Street, just north of the Cornhusker Highway, and about 7 blocks from the Center Trailer Court; that he had gone through the Center Trailer Court at different times and observed the various states of its construction; that from his knowledge of the way the intercepter sewer goes through this area it would not be feasible to develop the area north of the present Center Trailer Court; and that he was familiar with the agreement between Reller and the Johnsons, and based on the value of the Johnsons' interest under the contract and the value of such interest after the intercepter sewer goes through this area, Johnsons' interest would have been diminished by $15,000 conservatively. This witness then proceeded to demonstrate in what manner he arrived at the above figure, which need not be set forth herein.

Rollie Johnson testified that he lives at 4100 Cornhusker Highway and operates and maintains the Center Trailer Court; that he has been connected with the Com-

mercial Center premises, upon which this court is located, for a little over 12 years; and that he had 3 years of engineering in college and is an electrical engineer. This witness further testified that he and Reller planned the Center Trailer Court, he personally directed and employed the help, and applied his personal knowledge to the building of the trailer court; that it was built in sections; that the first step in building a section would be a survey of the elevation of the land to make sure that there would be proper drainage; that the next step would be the utilities, sewer, water, and electricity; and that when the city was digging the ditch for the purpose of placing the intercepter sewer, he had a man patrolling and watching it, and he himself watched it as part of his duties to police the place to make sure nothing happened. This witness further testified that following the execution of the agreement, heretofore set forth in part, survey work was done, elevations were determined, a road was built, culverts were put in, and a well was drilled; that hired help was necessary to have in order to haul dirt, level the premises, and make the grade right; and that he expended $1,000, outside of his personal services, in carrying out the agreement. The items comprising the expenditure of $1,000 consisted of $500 for surveying to get the land laid out for trailer spaces, and $500 for building a road and putting in culverts. He further testified that since the city was going to put in an intercepter sewer there was no way that he could proceed further with the project; and that a well could not be built in close proximity to the city sewer because the water would not be fit for human use, and concrete roads could not be built over the easement. This witness further testified that the preparatory work and construction of the intercepter sewer has affected the operation of the completed and existing trailer court because the city flooded that area on a couple of occasions by blocking off the drainage ditch immediately north of the existing court; that prior to the construction

of the sewer there was no flooding or drainage problem at the trailer court; and that this flooding caused extra work and extra expense to this witness. This witness further testified that he determined his rights under the agreement; that the difference in the value of his rights before and after the construction of the intercepter sewer was $14,000 or $15,000; and that his agreement with Reller had no value subsequent to the building of the sewer, and no use can be made of the land affected by the sewer.

The plaintiffs asked leave to withdraw their rest, for the purpose of putting in further evidence in reference to the damages and measure of damages, and leave was granted by the trial court. Reller was recalled and testified that he knew the value, under the agreement, of the plaintiffs' interest in the property referred to in the agreement prior to the condemnation; that their value was $14,000; and that the value subsequent to the condemnation would not exceed $500.

Rollie Johnson testified that he knew the value of the interest that he and his wife had under the terms of the agreement with Reller prior to the condemnation which was $14,000; and that the value subsequent to the condemnation of the interest of him and his wife would be nothing.

A duly qualified appraiser testified in behalf of the city. The effect of his testimony was that he was sent to the premises to negotiate a settlement with the plaintiffs but due to many difficulties he was unable to do so and unable to determine what value, if any, Johnsons had that was subject to damages as a result of the condemnation proceeding.

It also appears from the evidence that an annual permit was issued by the County of Lancaster to Rollie Johnson for the Center Trailer Court at 4100 Cornhusker Highway, signed by the chairman of the board of county commissioners and the county clerk, dated July 1959. Another permit of the same character was issued

to Rollie Johnson and dated July 1, 1961.

The city contends that the plaintiffs do not have an actual estate or interest in the soil, and that a mere contractual relation not creating an interest is not sufficient to permit recovery of damages by the plaintiffs in this condemnation proceeding.

We deem the following to be applicable to the instant case.

"A lease is a species of contract for the possession and profits of land and tenements, either for life, or for a certain period of time, or during the pleasure of the parties; and the essential elements of a contract must be present." 51 C. J. S., Landlord and Tenant, § 202 (b), p. 803.

"Whether an instrument is a lease or creates a relation other than that of lessor and lessee depends on the intention of the parties. The instrument is to be reasonably construed, and the practical construction given it by the parties thereto considered." 51 C. J. S., Landlord and Tenant, § 202 (e), p. 805.

An instrument may be given effect as a lease although the word "lease" is not used. See Moore v. Miller, 8 Pa. St. 272. See, also, Ault Woodenware Co. v. Baker, 26 Ind. App. 374, 58 N. E. 265; 51 C. J. S., Landlord and Tenant, § 202, p. 806.

In Van Avery v. Platte Valley Land & Investment Co., 133 Neb. 314, 275 N. W. 288, this court said: "Preliminary to the consideration of the determinative issues presented in the record before us, it may be noted that the validity of the lease of real estate here involved, and the bona fides of the relation of landlord and tenant created thereby, are in no manner affected by the provisions thereof determining that the amount of the rental shall be fixed at a definite percentage of the amount of income received by the tenant * * *." Cases are cited.

We conclude, from a review of the authorities heretofore cited, that the contract, in part previously set forth,

constitutes a lease between Reller and the plaintiffs.

The city next contends that the contract heretofore in part set forth does not contain an adequate description of the property contemplated in the lease. On this point the following are applicable.

"The instrument usually contains a description of the demised premises, and it has been held that the lease should contain a sufficiently accurate description of the property demised as clearly to indicate just what property is intended to be covered by the lease, as the want of such description may render the lease inoperative. However, no particular form of description is necessary; any description by which the identity of the leased property may be established is sufficient. * * * Where the parties have by their conduct located the property, it has been held that it is no objection that it was not described in the lease." 51 C. J. S., Landlord and Tenant, § 214, p. 818.

In Boyd v. McElroy, 105 Colo. 527, 100 P. 2d 624, the court said: "In litigation over a lease * * *, the parties concerned being fully acquainted with the premises, any uncertainty in description was cured by the introduction of record evidence accurately describing the land."

In the instant case, as heretofore mentioned, certain exhibits were received in evidence by which the land here involved was sufficiently and adequately described.

In view of the authorities cited and the exhibits, we conclude that the contention of the city is without merit.

Other cases pertinent to a determination of this appeal are as follows.

In Gledhill v. State, 123 Neb. 726, 243 N. W. 909, this court held: "A tenant for a term has a property right in land, which is protected by section 21, art. I of the Constitution." See, also, Fair-Way Oil Co. v. State, 132 Neb. 707, 272 N. W. 917; State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196; Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200; Brooklyn

Eastern Dist. Terminal v. City of New York, 139 F. 2d 1007, 152 A. L. R. 296.

In the light of the evidence and the foregoing authorities, the plaintiffs have an estate and interest in the land described in the plaintiffs' petition, which required the city to compensate the plaintiffs in damages for the taking of a part thereof and damaging plaintiffs' property.

With reference to the city's assignment of error that the trial court abused its discretion in allowing the plaintiffs to withdraw their rest and put on evidence as to the value of the leasehold, we will not repeat the evidence with reference to this matter. The city does lay great stress on this evidence because the witnesses did not use the words "market value."

It cannot be questioned that the owner of the real estate which is taken in a condemnation proceeding, or the lessee thereof, who is familiar with its value, and the owner of personal property can testify as to its value. See Chicago, R. I. & P. Ry. Co. v. Buel, 56 Neb. 205, 76 N. W. 571.

In Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833, this court said: "* * * where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation." See, also, Republican V. R. R. Co. v. Arnold, 13 Neb. 485, 14 N. W. 478; Blakeley v. Chicago, K. & N. Ry., 25 Neb. 207, 40 N. W. 956; Burlington & M. R. Co. v. White, 28 Neb. 166, 44 N. W. 95; Chicago, R. I. & P. Ry. Co. v. Buel, *supra;* Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168.

As stated in 20 Am. Jur., Evidence, § 897, p. 755: "Ordinarily, property owners who have lived for some time in the vicinity and know the property are qualified to testify to its value."

As stated in Miller v. Drainage Dist., 112 Neb. 206, 199 N. W. 28: "The owner of personal property is quali-

fied by reason of the ownership relation to give his estimate of the value of such property." See, also, McGuire v. Thompson, 152 Neb. 28, 40 N. W. 2d 237; Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141.

The evidence adduced in the instant case was sufficient to present to the jury the evidence of the plaintiffs' witnesses as to value of the property taken from the plaintiffs in the condemnation proceeding. The city made no objection to any of the trial court's instructions which properly presented the measure of damages as applied to the facts in the instant case. While the city lays great stress upon the words "market value," we conclude, in the light of the record, no prejudicial error resulted from the failure to use the words "market value."

This court held in Luikart v. Continental Nat. Bank, 126 Neb. 598, 253 N. W. 905: "Whether party may withdraw his rest and introduce further testimony rests within sound discretion of trial court." See, also, Hall v. Vakiner, 124 Neb. 741, 248 N. W. 70; 88 C. J. S., Trial, § 105, p. 220.

There is no indication in the record that the trial court abused its sound legal discretion.

Other matters raised by the city need not be determined in the light of the evidence and the authorities heretofore set forth.

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. M. ROBERT FROMKIN, APPELLEE.

120 N. W. 2d 25

Filed March 1, 1963. No. 35300.

1. **Criminal Law. If an accused is brought to trial within the statutory time after indictment or information, and such trial**

results in a mistrial from disagreement of the jury, accused cannot ignore the mistrial and claim a discharge or mistrial on the ground that he was not tried within the time fixed by the statute.

2. ———. Under section 29-2023, R. R. S. 1943, a mistrial because of disagreement of the jury shall be without prejudice to the prosecution to the State's right to retry a defendant.
3. **Constitutional Law: Criminal Law.** The Legislature has interpreted the Constitution on a matter of a speedy trial and has fixed what, in certain cases and under certain conditions, is regarded as the maximum time in which a defendant must be tried. The interpretation of this constitutional provision is for the court, but the maximum time fixed by the Legislature is a reasonable one, and we adopt it as our own.
4. Criminal Law. After the statutory requirements are satisfied as to the first trial, the time for retrial is within the sound discretion of the court; provided, that it may not extend beyond the statutory limits provided for the first trial.
5. ———. In computing the terms required by the statute with relation to the time within which the defendant must be brought to trial, the term in which the information is filed is excluded.
6. ———. Evidence examined, and it is found that there was no abuse of discretion by the trial court considering all of the circumstances surrounding the determination of the time for the retrial of the defendant.

Appeal from the district court for Douglas County: FAY H. POLLOCK, Judge. Reversed and remanded.

Clarence A. H. Meyer, Attorney General, and Rush C. Clarke, for appellant.

John J. Powers, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

The questions involved in this case concern the proper construction and application of our constitutional provision with relation to speedy trial, Article I, section 11, Constitution of Nebraska, and the statute relating thereto being section 29-1203, R. R. S. 1943. The statute provides: "If any person indicted for any offense, who has given bail for his appearance, *shall not be brought*

to trial before the end of the third term of the court in which the cause is pending, held after such indictment is found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay shall happen on his application, or be occasioned by the want of time to try such cause at such third term." (Emphasis supplied.)

The general questions arising out of the assignments of error may be more precisely stated as follows:

1. Does a mistrial during the third term, due to disagreement of the jury, constitute a compliance with the statute on behalf of the State?

2. If the State is entitled to retry a defendant after mistrial occurring during the third term, within what period of time must he be brought to trial again in the succeeding terms of court?

For purposes of clarity, the pertinent facts break down into three distinct periods for consideration. The first period is as follows: The defendant, felony charged, was informed against on February 4, 1960, during the September 1959 term of the district court for Douglas County, Nebraska. Bail was given. The February term of court commenced on February 8, 1960, and adjourned on April 30, 1960. The May term commenced on May 2, 1960, and adjourned on September 17, 1960. The September term commenced on September 19, 1960. On September 26, 1960, the defendant was arraigned in district court, pleaded not guilty, a jury was empaneled and sworn, evidence was introduced, the jury instructed, and it retired for deliberation. A disagreement of the jury resulted, and a consequent mistrial was declared by the court on September 28, 1960. It appears that all of the district judges of the Douglas County district court disqualified themselves, that another district judge from outstate was called in to try the case, and that various motions and a demurrer to the information were ruled on during the second term of court after the information was filed on June 13, 1960.

Period 2: The September term, during which the mistrial occurred, expired on February 11, 1961. In the first term after the term in which the mistrial occurred, namely, the February 1961 term, the defendant was not tried again. This term expired on May 6, 1961, and during the second term subsequent to the mistrial, namely, the May 1961 term, the defendant was retried. Again, the jury was unable to agree, a mistrial was declared, and it was discharged for this reason on May 27, 1961. This term of court expired on September 16, 1961. Again, the regular district judges were disqualified, and the trial was conducted by the same district judge from outstate. No objection, by the defendant, was raised as to his second trial, nor was there any motion for discharge or issue raised as to whether the statute, or constitutional provision referred to herein previously, was complied with.

Period 3: The May term in which the second mistrial was held expired September 16, 1961. During the next, or September term, the defendant was not tried again nor did he request, in any manner, a trial. This time, the disqualification of the regular judges continuing, another and different district judge was called in to preside over further proceedings in the case. The September term, or the first term after the second mistrial, expired on February 12, 1962. The defendant filed his amended motion for discharge on March 16, 1962, and on the following day, March 17, 1962, the court entered its order discharging the defendant. The court found specifically that four terms of court had elapsed after the term in which the information was filed during which the defendant was not brought to trial, including the February and May 1960 terms of court, the February 1961 and September 1961 terms of court and on that ground alone. The theory upon which this finding was based was specifically stated in a memorandum by the trial court holding that the terms of court in which the jury disagreed are excluded in

the counting of terms under section 29-1203, R. R. S. 1943. From this judgment of discharge, the State has appealed.

We refer now to the facts set out in period 1 above. In computing the three terms required by the statute, the term in which the information is filed is excluded. Whitner v. State, 46 Neb. 144, 64 N. W. 704. The disagreement of the jury and mistrial occurred during the third term after the information was filed. The significance of this mistrial with relation to compliance with the statute is essential in the determination of this case. The trial court held that the mistrial without verdict does not constitute compliance with the statute; excluded this term entirely from consideration; found that there was a total lapse of four terms before the second trial in May 1961 which, in turn, again must be excluded on the same theory; and that the defendant, therefore, was entitled to discharge.

We do not agree with this conclusion. The statute is not capable of double interpretation or ambiguity. The Legislature chose the words "brought to trial," as the testing yardstick of compliance. Under the facts that we have recited, everything was complete about the trial during the third term of September 1960, except the unfortunate circumstance of the jury being unable to agree upon a verdict. To construe the words in the statute "brought to trial," to mean, in effect, a mandatory requirement that the trial must result in verdict, would do violence to the plain meaning of the statutory language. This statute imposes a duty upon the prosecution. It appears evident that everything within the power of the prosecution was done to complete the trial, but that the jury itself was unable to reach a verdict.

The significance of a mistrial due to disagreement has been legislatively defined in section 29-2023, R. R. S. 1943, of our code of criminal procedure. It provides as follows: "In case a jury shall be discharged * * * after they have been kept so long together that there is no

probability of agreeing, the court shall, upon directing the discharge, order that the reasons for such discharge shall be entered upon the journal; and *such discharge shall be without prejudice to the prosecution.*" (Emphasis supplied.) The emphasized language in this statute contains no qualification. We can see no room in the language of these statutes for a distinction which would support the trial court's conclusion completely nullifying the effect of this mistrial occurring during the third term. To hold otherwise would be to judicially excise two pertinent provisions from the applicable statutes. The defendant was "brought to trial," and a mistrial must be "without prejudice" to the State's right to a retrial. This construction follows the plain and unambiguous language of the two statutes involved. Construing the statutes in pari materia, it is the only possible way to harmonize their meaning within the framework of their obvious purpose. This interpretation also appears to be the majority rule, even in jurisdictions where the statute mandates "trial," and where there is no special statute requiring that mistrial shall be without prejudice to the prosecution.

As stated in 22A C. J. S., Criminal Law, § 472 (3), p. 60: "If accused is tried within the statutory time after indictment, information, or commitment, and such trial results in a mistrial, as when the jury fail to agree, accused cannot ignore the mistrial and claim a discharge or dismissal on the ground that he was not tried within the time fixed by the statute providing for that relief. * * * Cal.-People v. Pierson, 307 P. 2d 994, 149 C. A. 2d 151-People v. Cryder, 202 P. 2d 765, 90 C. A. 2d 194-People v. Maupins, 158 P. 502, 30 C. A. 392. * * * Fla.-State v. Dowling, 107 So. 267, 91 Fla. 236. * * * Ind.-* * * Kops v. State, 42 N. E. 2d 58, 62, 220 Ind. 373. * * * Iowa.-Ferguson v. Bechly, 277 N. W. 755, 224 Iowa 1049. * * * Or.-State v. Clark, 168 P. 944, 86 Or. 464. * * * 16 C. J. p. 442 note 38 [b], p. 446 notes 5, 6."

Illustrative of the above authorities is a case almost squarely in point. In State v. Dilts, 76 N. J. Law 410, 69 A. 255, the statute provided for a discharge if the defendant was not tried during the term, "* * * in which the issue is joined, or the term after." Construing this statute the court said: "Under the view we take of the meaning and purpose of the statute, it was satisfied by the trial and disagreemnt of April term, 1907, and became inoperative thereafter."

In State ex rel. Gayle v. Dowling, 91 Fla. 236, 107 So. 267, the statute, as far as pertinent here, provided: "* * * and if he is not tried at or before the third term after his examination he shall be forever discharged from the crime." There were three successive mistrials in this case. It was contended that the petitioner was entitled to be forever discharged because he had not been tried at or before the third term after his examination. The court said: "A trial is had within the meaning of the organic and statutory provisions even though the jury disagree and are discharged and a mistrial entered of record; * * * such mistrial does not constitute former jeopardy. * * * The State is not responsible for the criminal act charged, or for the failure of juries to agree upon verdicts, * * *."

In Davis v. State, 51 Neb. 301, 70 N. W. 984, we feel that our court passed upon the precise question involved here. Our court said: "If the sections of the Criminal Code just quoted are to be so construed as to entitle one under indictment for a crime and incarcerated to be discharged unless brought to trial before the end of the third term held after the term at which the indictment is found, still the motion was without merit, *as the record shows that the prisoner was brought to trial, although the jury disagreed, at the first term of court held after the term at which the indictment was returned.*" (Emphasis supplied.)

The defendant cites a number of cases purporting to sustain the holding of the trial court. We have care-

fully examined these cases. We are unable to find in any of these cases support for the theory of the defendant that the mistrials did not constitute a compliance with the statute. The closest case that the defendant cites is Nix v. State, 5 Ga. App. 835, 63 S. E. 926. This case is strongly relied upon by the defendant. The Georgia court did hold that the mistrial due to disagreement of the jury constituted a noncompliance with the applicable statute. But in this case, the statute applied to situations in which a defendant made a demand for trial and specifically provided as follows: "* * * if such person shall not be tried at the term when the demand is made, or at the next succeeding term thereafter * * * *he shall be absolutely discharged and acquitted of* the offense charged in the indictment." (Emphasis supplied.) Appropriate comparison of that statute and ours makes the distinction apparent.

We hold, therefore, that the September 1960 mistrial during the third term constituted a compliance with the statute, and the State was entitled to retry the defendant.

We go now to period 2 of the facts, ending with the mistrial from jury disagreement in the second term subsequent to the first trial. When must the defendant be retried within the meaning of our statute and the constitutional guarantee as to a speedy trial?

The statute in question here has been interpreted and given relationship to the constitutional guarantee of a speedy trial in Maher v. State, 144 Neb. 463, 13 N. W. 2d 641, wherein we held: "The legislature of our state has interpreted the Constitution on the matter of a speedy trial by fixing what, in certain cases and under certain conditions, is to be regarded as a maximum time within which a defendant must be tried. The interpretation of this constitutional provision is for the court, but since the time fixed by the legislature is not unreasonable, we adopt it as our own."

Within the framework of this basic interpretation, we feel that the case of Wilson v. State, 120 Neb. 468, 233

N. W. 461, answers our question as to the time in which a retrial must be had. This case was on remand from the Supreme Court, after reversal in favor of the defendant. The defendant was without bail. The applicable sections of the statute require trial in this situation within two terms after the date of the mandate. The retrial after remand was held in the third term. It was contended that the statute applied, and the defendant was entitled to discharge, a situation must stronger in favor of the defendant than the facts presented here. Our court said: "On this feature it has been held that the constitutional or statutory requirements are satisfied by a speedy first trial, and that the time for retrial is not a matter of absolute right but is addressed to the discretion of the court."

Here, also pertinent, is the following from the recent case of Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649. The proper interpretation of our statute with relation to the constitutional guarantee of speedy trial was again stated as follows: "In Shepherd v. United States, 163 F. 2d 974, it is said: 'The constitutional guarantee of a "speedy trial" is intended to prevent the oppression of a citizen by delaying criminal prosecution for an indefinite time and to prevent delays in administration of justice by requiring judicial tribunals to proceed with reasonable dispatch in trial of criminal prosecutions. * * * A "speedy trial", generally, is one conducted according to prevailing rules and proceedings of law, free from arbitrary, vexatious and oppressive delays. * * * The right of accused to discharge for failure to receive a speedy trial is a personal right which may be waived, and it ordinarily is waived if accused fails to assert his right by making a demand for trial, by resisting a continuance, by going to trial without objection that time limit had passed, or by failing to make some effort to secure a speedy trial.' * * * We fail to find in the record any protest or objection made on the part of the defendant until he filed his plea in abatement on Sep-

tember 19, 1958. This plea in abatement refers to a 'speedy trial.' We fail to find in the record any request by the defendant for an immediate trial."

There is a divergence of the holdings by the courts of other states as to whether the statute runs again after having been complied with in the first instance, or whether a new trial, within the meaning of the constitutional guarantee as to speedy trial, must take place within the sound discretion of the court. See 22A C. J. S., Criminal Law, § 472 (4), p. 61, and cases cited thereunder.

Our holding in Maher v. State, *supra,* was to the effect that the Legislature fixed a three-term limit; and that the statute was reasonable, and would be enforced. Our holding in the Wilson case was to the effect that after the requirements of the statute had been met as to a first trial, that the time for retrial rested within the sound discretion of the court. We hold, therefore, that the statute, as such, does not apply a second time; and that it has run its course with compliance to the first trial. But, we hold that independent of the statute, the retrial, or retrials, must be held within a reasonable time within the sound discretion of the court. We further hold that since we have held that the statutory provision was a reasonable one as to the outside limits of time permitted for a first trial, that the time limit for a retrial, or retrials, should be fixed as not extending beyond what we have held to be reasonable for the first trial. It, therefore, appears that the rule is, after the statutory requirements are satisfied as to the first trial, the time for retrial is not a matter of absolute right, but is left to the sound discretion of the court; provided, that it may not extend beyond the statutory limit provided for the first trial.

We go now to the third period. The second trial in this case in May 1961 ended in a mistrial because of disagreement of the jury. Within the range of the rule that we have stated herein, it was the duty of the State

to retry the case within a reasonable time within the sound discretion of the court, not to exceed three terms thereafter. A motion for discharge herein was filed and sustained by the trial court, in March 1962, *in the second term after the second mistrial.*

Neither in the motion for discharge filed by the defendant, nor in the argument of defendant's counsel, at any place is it urged that there was an abuse of sound judicial discretion by the court, as such, after the first and second trials. The defendant's contention is that he is entitled to discharge as a matter of right following the reasoning that the terms in which the mistrial occurred didn't count under the statute, and, therefore, he was entitled to discharge as a matter of right because more than three terms had elapsed. As we have stated before, this contention cannot be sustained. However, giving the defendant the benefit of the maximum reach of his argument, we can find nothing in this record that would indicate an abuse of sound judicial discretion by the district court in connection with the time of these trials. All of the Douglas County district court judges disqualified themselves, and it is not urged that this determination was erroneous, nor is any error claimed in the manner of the fixing of the terms of court. It does not appear that there was any change from previous rule and custom in this respect. It appears that two different district judges from outside the judicial district, having their own judicial work to dispose of, were called in to handle this case. It is true that there were numerous juries called for 2-week terms within the terms of court during the intervening time between the two mistrials. But, there is nothing in the record that would indicate affirmatively that the district court for Douglas County abused this discretion in this respect. The yardstick adopted by the statute for the first trial is the number of terms elapsing, and not the number of juries called. We find nothing in the record in this case that would indicate an abuse of discretion in this

respect, and more especially in light of the fact that it was necessary that judges be called in from outstate in order to dispose of this case. The record is silent as to any request of the defendant to be tried more expeditiously than he was. At no time prior to the first trial, or prior to the second trial, or subsequent to the second trial up to the time of the filing of the motion on March 16, 1962, did he claim error or claim that his rights were violated with relation to the speed of his trial. Even assuming that he was under no duty to do so, we deem these facts significant with relation to the determination of whether there was an affirmative abuse of discretion by the trial court. We deem pertinent here the quotation from Shepherd v. United States, 163 F. 2d 974, which we quoted with approval in Svehla v. State, *supra,* which states as follows: "The right of accused to discharge for failure to receive a speedy trial is a personal right which may be waived, and it ordinarily is waived if accused fails to assert his right by making a demand for trial, by resisting a continuance, by going to trial without objection that time limit had passed, or by failing to make some effort to secure a speedy trial." In the Svehla case, the court then went on to find substantially the same facts as appear in the record here, namely, that there was no protest or objection made, or request for trial made on behalf of the defendant, until he filed his motion for discharge or plea in abatement at a later date.

Considering all of the facts in the record, we hold that there was no abuse of discretion by the court as to the time that the previous trials were held in September 1960 and in May 1961. This reasoning is further reinforced by our holding, as we stated above, in the Svehla case with relation to the significance of the failure of the defendant to object or affirmatively ask for a trial at an earlier date.

We have some difficulty in determining the exact nature of the defendant's theory in this case. The de-

fendant's theory seems to be that the first two terms before the first mistrial in the third term should be counted as against the State. Then, he proceeds on the theory that a mistrial in such third term doesn't count against either the State or the defendant. He proceeds to tack the first two terms onto the one transpiring after the mistrial, all of this resulting in the conclusion that there were more than three terms that had expired prior to the second mistrial. Such a conclusion, as we have pointed out, has no basis in reason or authority. It would result in a judicial interpretation of our statute that a retrial after a mistrial in the third term would have to take place in the immediately succeeding next term. There is no authority for this in the statute, and it would be contrary to our holding in the cases that we have cited. The time that we have fixed for the retrial after a mistrial, under our holdings here, is a reasonable one resting within the sound discretion of the court and setting a maximum limit. This is the only way to harmonize the statutes involved and our affirmative holdings as to the construction of the constitutional provision providing for a speedy trial. The only logical way that the defendant can sustain his position is that the first mistrial in this case is a complete nullity and that the term, therefore, does count against the State. If that were so, the defendant would have been entitled to his discharge in the February 1961 term, being the fourth term. This position he did not assert or take at that time, nor does he assert it now, because the position he takes now rests upon the proposition that the term in which the mistrial occurred doesn't count against either the State or the defendant.

As we have shown, the complete answer to this contention is simply that the mistrial did constitute a compliance and the question is within what period of time after statutory compliance must he be retried.

We hold, therefore, that the discharge of the defendant on March 17, 1962, was in error. We reverse the

order of discharge and remand the cause to the district court for proceedings in conformity with this opinion.

REVERSED AND REMANDED.

FREDERICK H. BUCHOLZ ET AL., APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
120 N. W. 2d 270

Filed March 1, 1963. No. 35311.

1. **Zoning: Municipal Corporations.** The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals, and the general welfare. Any such act of the city must, however, not be unreasonable, discriminatory, or arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance.
2. ———: ———. The validity of a zoning ordinance must be determined by an examination of the facts presented in the particular case. Whether a zoning ordinance is arbitrary and unreasonable, or illegal, must be determined by the evidence of the special surrounding conditions and circumstances.
3. ———: ———. The burden is on one who attacks the validity of a zoning ordinance, valid on its face and enacted under lawful authority, to prove facts which establish its invalidity.
4. ———: ———. The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.
5. **Zoning.** Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control.
6. ———. The exercise of the power to zone may not be denied on the ground that individual property rights may be adversely affected thereby.
7. **Zoning: Municipal Corporations.** What is the public good as it relates to zoning ordinances affecting the use of property is primarily a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed; and unless an abuse of discretion has been clearly shown, it is not the province of the court to interfere.
8. **Zoning.** Spot zoning is a descriptive term rather than a legal term. Spot zoning as such is not necessarily invalid, and its validity depends upon the facts and circumstances appearing in the case.

9. ———. Spot zoning generally refers to the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned and to the detriment of the area and other owners therein.
10. ———. The fact that only one tract of land or one owner is involved in a zoning change does not make the rezoning invalid spot zoning.
11. **Municipal Corporations.** A city has no right or power to enter into contracts which curtail or prohibit an exercise of its legislative or administrative authority.
12. **Zoning: Municipal Corporations.** Ordinances rezoning certain property to permit the construction of a regional shopping center are not invalid because the owner of the property and the applicants for rezoning, at the direction of the city council, executed and recorded a protective covenant agreement which required that the property be developed in accordance with a plan presented to the city council in support of the application for rezoning, which agreement was submitted to and approved by the city council and was an inducement for the rezoning action.

Appeal from the district court for Douglas County: EDWARD A. MULLERY, Judge. Reversed and remanded with directions to dismiss.

Herbert M. Fitle, Fraser, Wenstrand, Stryker, Marshall & Veach, Wear, Boland, Mullin & Walsh, Webb, Kelley, Green & Byam, and Abrahams, Kaslow, Story & Cassman, for appellants.

Bernard J. Boyle, John W. Delehant, Jr., and Joseph T. Votava, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This action was brought to declare two zoning ordinances of the city of Omaha, Nebraska, void. The district court declared the ordinances to be void and enjoined the defendants from exercising any rights under them. The defendants' motion for new trial was overruled and they have appealed to this court.

The assignments of error are that the judgment of the

district court is not sustained by the evidence and is contrary to the evidence and the law. It is the duty of this court to try the issues of fact complained of de novo and reach an independent conclusion without reference to the findings of the district court. § 25-1925, R. R. S. 1943; Toelle v. Preuss, 172 Neb. 239, 109 N. W. 2d 293.

The land involved in this action is located north of Dodge Street Road and east of One Hundred Second Street in Douglas County, Nebraska. It is within 3 miles of the corporate limits of the city of Omaha and is subject to the zoning ordinances enacted by the city council of the city of Omaha.

The defendants are the city of Omaha and certain of its officers; Leo M. Waxenburg, trustee; John A. Wiebe; and Westroads, Inc. Waxenburg is the owner of a 103-acre tract of land bounded on the west by One Hundred Second Street and on the south by Dodge Street Road. Wiebe obtained an option to purchase the Waxenburg land and assigned the option to Westroads, Inc. Westroads, Inc., is a corporation organized by Wiebe for the purpose of developing a large regional shopping center upon the Waxenburg land.

The plaintiffs own an 80-acre tract of land which lies north of and adjacent to the Waxenburg land. In 1954, an area which included the Waxenburg land and the plaintiffs' land was rezoned from Second Suburban District to Second Residence District. A Second Residence District is a low-density residential zone.

In 1959, Wiebe and Westroads, Inc., filed an application to rezone a part of the Waxenburg land. The application was referred to the planning board which recommended that it be denied. The city council, after holding a public hearing upon the application, referred it to the planning board for further study. The planning board again recommended that the application be denied. After a second public hearing the city council adopted a motion which stated that the city council did not concur in the recommendation of the planning board and di-

rected that rezoning ordinances and protective covenants be prepared. Thereafter, the city council enacted ordinances rezoning a part of the Waxenburg tract and approved a protective covenant agreement submitted to it.

Ordinance No. 21464 rezones an irregular tract of approximately 11.2 acres near the center of the Waxenburg land from Second Residence District to First Commercial District. Ordinance No. 21463 rezones a 47.3-acre tract surrounding the 11.2-acre tract from Second Residence District to Parking Lot District. The rest of the Waxenburg land, amounting to approximately 44.5 acres, remains Second Residence District.

The issue in this case is whether the rezoning of a part of the Waxenburg land was illegal and therefore void. That issue must be determined by the application of the following rules.

The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals, and the general welfare. Any such act of the city must, however, not be unreasonable, discriminatory, or arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance. City of Omaha v. Cutchall, 173 Neb. 452, 114 N. W. 2d 6.

The validity of a zoning ordinance must be determined by an examination of the facts presented in the particular case. City of Omaha v. Glissmann, 151 Neb. 895, 39 N. W. 2d 828. Whether a zoning ordinance is arbitrary and unreasonable, or illegal, must be determined by the evidence of the special surrounding conditions and circumstances. The burden is on one who attacks the validity of a zoning ordinance, valid on its face and enacted under lawful authority, to prove facts which establish its invalidity. Weber v. City of Grand Island, 165 Neb. 827, 87 N. W. 2d 575.

The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the

contrary. Davis v. City of Omaha, 153 Neb. 460, 45 N. W. 2d 172.

The evidence in this case consists of 993 pages of testimony and 82 exhibits. We will not attempt to summarize the entire record but will limit our discussion to those facts which we believe to be controlling.

The Waxenburg land, and the property adjacent to it, is largely undeveloped. Its use is predominantly agricultural. A part of the plaintiffs' land has been platted for residential purposes and three expensive homes have been constructed upon it. Two similar homes have been constructed on the property north of the plaintiffs' land, two on the property west of Ninety-sixth Street and east of the Waxenburg land, and two on that property southeast of the Waxenburg land. The area directly south and directly west of the Waxenburg land is undeveloped.

The city is empowered to divide the area into districts and regulate the use of buildings and land within the districts. § 14-402, R. R. S. 1943. "Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements, and to promote convenience of access. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality." § 14-403, R. R. S. 1943.

The plaintiffs make a number of contentions based upon the requirements of section 14-403, R. R. S. 1943. One of the principal contentions of the plaintiffs is that

the rezoning of the Waxenburg land is illegal because it will not "lessen congestion in the streets" but will result in an increase in the traffic load on Dodge Street Road. Dodge Street Road is a heavily traveled 4-lane highway. Interstate Highway No. 280 intersects Dodge Street Road at a point approximately 1,200 feet west of One Hundred Second Street. At that point (One Hundred Fifth Street) an interchange is being constructed. There can be no doubt but that the construction of a large regional shopping center on the Waxenburg land will result in a substantial increase in the traffic load on Dodge Street Road. However, that does not establish that the zoning is illegal. The construction of a large regional shopping center in any location would increase the traffic on the streets and highways leading to it. The real question is whether the Waxenburg land is an appropriate location for such a development.

The planning board did not oppose the construction of a large shopping center on Dodge Street Road near the interstate highway interchange. The planning board took the position that the area east of the interstate highway should remain zoned residential and that the area west of the interstate highway should be zoned commercial. There is no commercial development along Dodge Street Road between Ninetieth Street and the interstate highway at this time except that a tract between Ninetieth and Ninety-third Streets has been rezoned to Residence District 9 to permit the construction of an office building.

There has been some commercial development along Dodge Street Road west of One Hundred Eighth Street and the Big Papillion Creek Drainage Ditch. It is questionable whether the shopping center which has been proposed could be developed on the land west of the interstate highway. That, however, is not an issue in this case.

The important fact here is that the planning board did not consider the traffic load on Dodge Street Road

near the interstate highway such that the property in that area could not be zoned commercial. There is evidence that the planning department at one time considered commercial development for all four quadrants of the interchange. A memorandum from the planning director dated February 10, 1959, and addressed to the director of public works stated as follows: "The land use studies of the City Planning Department indicate the four quadrants of this interchange will be developed as soon as the highway is opened for a large 100 acre shopping center, a large insurance office site, and two large steak house-motel sites. * * * The potential traffic generated may run as high as 5200 cars per day to the shopping center along (alone) which certainly indicates need for adequate circulation in the area."

Burt Whedon, the city traffic engineer, testified that he could not think of a better place to locate a regional shopping center in Omaha than at the northeast quadrant of the Dodge Street Road interchange.

John I. Cofer, a planning consultant of considerable experience, testified that in his opinion the most appropriate use of the land near the northeast quadrant of the Dodge Street Road interchange would be for the development of a large regional shopping center. This witness emphasized that because of the accessibility of this land, the welfare of the community as a whole required that the land be used for a purpose which would tend to concentrate a large number of people at that location or provide a convenience to a wide area of the city.

The most that can be said of the evidence presented by the plaintiffs on this issue is that it established that there is a difference of opinion as to whether the Waxenburg land is an appropriate location for the development of a large regional shopping center. Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be al-

lowed to control. Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N. W. 835.

The plaintiffs contend that the rezoning is illegal because it does not conserve the value of their buildings. If it is assumed that the value of the homes constructed upon the plaintiffs' land is depreciated by the rezoning, that alone does not establish that the rezoning is illegal. The exercise of the power to zone may not be denied on the ground that individual property rights may be adversely affected thereby. Davis v. City of Omaha, *supra*. The plaintiffs have no right to insist that under no circumstances should the zoning of the land adjacent to their land be changed. The power to zone includes the power to rezone under proper circumstances. One of the plaintiffs admitted, upon cross-examination, that there have been many changes in the character of the land in that area within the last 4 or 5 years. The rights of the owners of the adjacent land and the public welfare must receive consideration.

The plaintiffs contend that the rezoning is illegal because the Waxenburg land is of a residential character, that it has a peculiar suitability for residential use, and that the most appropriate use of it would be for residential purposes. The evidence presented by the plaintiffs tends to establish this contention but there is ample evidence to the contrary. At most, the evidence establishes that the classification is debatable. In this connection we note that the judgment of the trial court stated: "We do not hold that no commercial development shall be permitted on any part of the Waxenburg tract." The trial court held only that a development of the scope and nature proposed was illegal.

What is the public good as it relates to zoning ordinances affecting the use of property is primarily a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed; and unless an abuse of discretion has been clearly shown, it is not the province of the court

to interfere. Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N. W. 2d 634.

The contention of the plaintiffs that the rezoning is illegal because it is not in accordance with a comprehensive plan and is invalid "spot zoning" is not supported by the evidence. Spot zoning is a descriptive term rather than a legal term. Spot zoning as such is not necessarily invalid, and its validity depends upon the facts and circumstances appearing in the case. Weber v. City of Grand Island, *supra*. Spot zoning generally refers to the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned and to the detriment of the area and other owners therein. The fact that property zoned residential is near property zoned industrial does not make the zoning illegal, and the validity of spot zoning depends upon more than the size of the spot. Graham v. Graybar Electric Co., 158 Neb. 527, 63 N. W. 2d 774. The fact that only one tract of land or one owner is involved in a zoning change does not make the rezoning invalid spot zoning. Partain v. City of Brooklyn (Ohio), 138 N. E. 2d 180.

The fact that the area involved in this action is largely undeveloped is important. This is not a case where the applicants propose to construct a large apartment house or super market in a fully developed residential area as in Davis v. City of Omaha, *supra*, and Weber v. City of Grand Island, *supra*. The applicants in this case propose a plan for the development of a 103-acre tract of undeveloped land. The plan contemplates an 11.2-acre commercial district surrounded by a 47.3-acre parking lot district. The remaining 44.5 acres along the north and east sides of the tract are to be developed as a Second Residence District.

In reality, the plan proposed by the applicants is a comprehensive plan for the development of a rather large tract of undeveloped land. Under the circum-

stances of this case it was within the power of the city council to rezone a part of the Waxenburg land so that it could be developed as a shopping center.

The question that remains for consideration is the effect of the protective covenant agreement upon the validity of the rezoning action.

In support of the application for rezoning, the applicants presented their plan for the development of a shopping center on the Waxenburg land. The plan contemplates the construction of a building in the center of a large parking area. The land along the north and east sides of the parking area is to be developed as a second residence district. The applicants also propose to construct a grade-separation access facility for traffic entering the shopping center from Dodge Street Road which will eliminate left turns by traffic entering or leaving the shopping center.

While the application for rezoning was pending before the city council, the council obtained a report and recommendation from John I. Cofer, a planning consultant, concerning the proposed rezoning. Cofer's report was favorable to the rezoning if it would result in the development of a unified, integrated shopping center with proper provision for the relationship of the shopping center to its surroundings and the construction of suitable access facilities.

The motion adopted by the city council on July 5, 1960, which recited that the council did not concur in the recommendation of the planning board and which directed that rezoning ordinances be prepared, also directed that covenants be prepared for approval by the city council as follows: "(a) That a proper buffer zone be established of not less than 300 ft. between the shopping and parking area, and the abutting residential property. * * * (b) That adequate and reasonable traffic control, including the proper access roads, be established at no cost to the City of Omaha. * * * (c) That the City of Omaha retain control of its development in a covenant,

such that the development as outlined, be constructed."

The rezoning ordinances which were adopted by the city council at its meeting on October 4, 1960, do not refer to the protective covenant agreement in any way. At the same meeting and after the ordinances had been adopted, the council approved the protective covenant agreement dated October 3, 1960, which had been executed by the applicants and Waxenburg. The agreement expressly provides that it is not conditioned upon a rezoning of the Waxenburg land. However, for the purpose of this opinion, we assume that the protective covenant agreement was an inducement to the adoption of the rezoning ordinances.

The protective covenant agreement is between Waxenburg as first party and Wiebe and Westroads, Inc., as second parties. The agreement provides that the covenants shall run with the land and shall be for the use and benefit of Waxenburg, the city of Omaha, and the owners of the land which is adjacent to the Waxenburg land. The covenants are to remain in force for a period of 10 years after the shopping center is open for business.

The agreement recites that the second parties have represented to Waxenburg, the city of Omaha, and the owners of adjacent land that rezoning of a part of the Waxenburg land has been requested for the purpose of developing a regional shopping center upon the Waxenburg land; that second parties will provide a grade-separated access to the shopping center from Dodge Street Road without cost to the city of Omaha; and that a part of the Waxenburg land will remain Second Residence District to constitute a buffer zone of at least 300 feet along the north and east sides of the area to be rezoned. The agreement also recites that the city council directed that covenants be submitted to the city to insure that the representations of the second parties would be fulfilled.

The agreement provides that construction shall commence within 5 years; that construction in the area

zoned First Commercial District shall be limited to an integrated regional shopping center; that construction in the area zoned Parking Lot District shall be limited to parking areas, planting areas, landscaped areas, and sidewalks; that the 44.5 acres not rezoned shall be subdivided and platted into residence lots and streets; that vacant areas not in the process of construction shall be landscaped and maintained neatly; and that the shopping center may not be opened for business unless and until a traffic grade-separated access has been constructed without cost to the city of Omaha. The agreement further provides that in the event of a breach of the covenants applicable to the land rezoned, or in the event the Waxenburg land is not conveyed to the second parties, the city of Omaha may again rezone the rezoned area to Second Residence District.

A city has no right or power to enter into contracts which curtail or prohibit an exercise of its legislative or administrative authority. City of Nebraska City v. Nebraska City Speed & Fair Assn., 107 Neb. 576, 186 N. W. 374. The plaintiffs contend that the protective covenant agreement in this case invalidates the rezoning ordinances because the action of the city council was the result of a bargain or agreement between the applicants and the city.

The evidence in this case does not show a bargain or agreement between the applicants and the city. There is evidence that the applicants made certain representations to the city council and other officials in an effort to secure the rezoning of a part of the Waxenburg land. Rezoning applications are usually supported by similar representations concerning the proposed use of the land in question and, in many cases, may be an inducement for the action taken by the zoning authorities. No one contends that an applicant for rezoning should not disclose the proposed use to be made of the land involved. The contention is that the applicants should not be

allowed to give some assurance that the proposed plans will be carried out.

The applicants in this case have merely agreed to do the things which they have represented that they intend to do. The effect of the protective covenant agreement is to give some further assurance to the city and the adjoining landowners that the representations of the applicants were made in good faith.

The effect of the protective covenant agreement is to give the city council greater control over the development of the property which was rezoned. To a limited extent, the use of the parking lot district classification and the fact that 44.5 acres of the Waxenburg land was not rezoned, accomplished the same result as the protective covenant agreement.

The protective covenant agreement appears to be for the benefit of the owners of the adjoining land and the city. It is difficult to see how the plaintiffs are prejudiced in any way by the agreement since everything that is to be done under the agreement could be done without such an agreement. In the event of a breach of the covenants, the agreement provides that the property may be rezoned. This result could be accomplished in the absence of any agreement.

The question of the effect of such agreements has been considered by the courts in other states. Some courts have held that such agreements invalidate rezoning action, but some of the recent decisions are to the contrary. The plaintiffs cite cases from New Jersey, Maryland, and Florida in which rezoning has been held invalid where such agreements were involved. See, Houston Petroleum Co. v. Automotive Products Credit Assn., Inc. (1952), 9 N. J. 122, 87 A. 2d 319; Baylis v. City of Baltimore (1959), 219 Md. 164, 148 A. 2d 429; Hartnett v. Austin (1956), (Fla.), 93 So. 2d 86. The defendants cite cases from New York, Massachusetts, and Maryland where rezoning has been held valid even though protective covenant agreements were involved.

See, Church v. Town of Islip (1960), 8 N. Y. 2d 254, 168 N. E. 2d 680; Sylvania Electric Products, Inc. v. City of Newton (1962), — Mass. —, 183 N. E. 2d 118; Pressman v. City of Baltimore (1960), 222 Md. 330, 160 A. 2d 379. See, also, Town of Somerset v. County Council for Montgomery County (1962), 229 Md. 42, 181 A. 2d 671; Pecora v. Zoning Commission of Town of Trumbull (1958), 145 Conn. 435, 144 A. 2d 48; Johnson v. Griffiths (1955), (Ohio App.), 141 N. E. 2d 774.

We conclude that under the facts and circumstances in this case the protective covenant agreement executed by the applicants did not invalidate the action of the city council which rezoned a part of the Waxenburg land.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

E. C. RANSDELL ET AL., APPELLANTS, V. SIXTH STREET FOOD STORE OF LEXINGTON, INC., A CORPORATION, APPELLEE.
120 N. W. 2d 290

Filed March 1, 1963. No. 35343.

1. **Trial: Judgments.** The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial.
2. ———: ———. The burden is upon the party moving for a summary judgment to show that no issue of fact exists and unless he can conclusively do so, the motion must be overruled.
3. ———: ———. In considering a motion for summary judgment, the court should view the evidence in the light most favorable to the party against whom it is directed.
4. **Trade Names.** Where a party has acquired a trade name in a particular locality, he is entitled to protection against unfair competition in his particular line of business by the use of a competitor of a name of such similar import as to probably deceive the public.

5. ———. Proof of fraud or deliberate deception is not necessary to establish unfair competition.
6. **Trial: Affidavits.** A genuine issue as to a material fact cannot be tried and determined upon affidavits, and this is especially true where the credibility of witnesses is involved.
7. **Trade Names.** A combination of the use of geographical names with generic words related to the description of a business may be used together in such a manner as to create a deceptive use under particular circumstances, and if they do, then such use may be actionable.
8. ———. Where the combination of generic words and geographical words or symbols is such that the resemblance is apt to mislead purchasers or those doing business with the company, and who are acting with ordinary and reasonable caution, or if it is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief.

Appeal from the district court for Dawson County: CLARENCE S. BECK, Judge. Reversed and remanded.

Smith Brothers, for appellants.

Hollman & McCarthy and Baskins & Baskins, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

This is an appeal from the order of the district court sustaining a motion for summary judgment and dismissing the plaintiffs' petition and action. It is an action brought by the plaintiffs as partners doing business in Lexington, Nebraska, as Sixth Street Locker and Grocery, to enjoin the defendant, Sixth Street Food Store of Lexington, Inc., from displaying and using a large sign reading "Sixth Street," and from using the words "Sixth Street," "Sixth Street Food Stores," and "Sixth Street Food Stores of Lexington, Inc.," or any combination thereof in the operation of its business on *Seventh Street* in Lexington, Nebraska.

We determine first what the issues actually were.

Plaintiffs alleged, by their amended petition, that they had established and had been in business in Lexington since April of 1950; that they had conducted their business under the name of "Sixth Street Locker and Grocery," and operated continuously on East Sixth Street; that they have, at all times, advertised and held themselves out to the public by this name; that it had become known to the general public of the trade area that the words "Sixth Street" and "Sixth Street Locker and Grocery" were a distinctive trade and business name belonging to the plaintiffs; and that said words had acquired a secondary meaning exclusively relating to the business in the trade area and community of Lexington, Nebraska. They alleged that they had built up and were enjoying a substantial business in the city of Lexington. It is then alleged that the defendant, "Sixth Street Food Stores of Lexington, Inc.," became incorporated on August 27, 1958; and that at that time it knew that the plaintiffs used the name "Sixth Street Locker and Grocery," and knew that the plaintiffs had used it continuously since April 1950. They alleged that the defendant began operation of its business *on Seventh Street* in Lexington; that it used, and continued to use the words "Sixth Street" and "Sixth Street Food Store" in the operation of its business; and that the defendant had a large sign over its place of business reading "Sixth Street," and is generally holding itself out to the public under the firm name and style of "Sixth Street Food Store." The plaintiffs specifically alleged that the defendant by the use of said sign and said names intended to mislead and confuse the customers of the plaintiffs; that this use did confuse the customers of the plaintiffs and beguile them into dealing with the defendant under the belief that they were dealing with the plaintiffs; and that there would be a deception of the general public and the plaintiffs' customers and a diversion of plaintiffs' customers to the defendant's place of business.

The plaintiffs further alleged that subsequent to August 27, 1958, the date that the defendant became incorporated, the defendant filed a trade name registration certificate with the Secretary of State, made legal publication thereof, and it now claims the right to use the trade name "Sixth Street Food Store." They alleged that this name is misleading and deceptive resulting in confusion in mail and shipments of merchandise, confusion of business accounts, and deception of the buying public into the belief that the defendant's business was the plaintiffs. There are further allegations of irreparable injury and formal allegations which we do not deem necessary to repeat here. The plaintiffs further alleged that 2 days after the incorporation of the defendant about August 27, 1958, by letter, they advised the defendant of their objection to the use of these words and demanded that the defendant cease and desist from using them.

We go now to the defendant's answer. It admitted the incorporation on August 27, 1958; admitted the mailing on August 29, 1958, of the letter from the plaintiffs demanding that it cease and desist; admitted that it filed a trade name registration with the Secretary of State on September 12, 1958, claiming the trade name "Sixth Street Food Store"; admitted that it operates its business on Seventh Street; admitted that it displays a large sign thereon reading "Sixth Street"; and admitted that it does hold itself out to the public as "Sixth Street Food Store." It further generally denied the allegations of the plaintiffs' petition; alleged that it has no intent to mislead or deceive by the use of these names; in substance, alleged that its right to use these names arises out of an assignment from companies or partnerships that had operated at North Platte and Ogallala for many years and had acquired the right to use the names "Sixth Street" and "Sixth Street Market"; alleged that said assignment was made on September 1, 1958; and

alleged that it was duly registered with the Secretary of State.

It should be pointed out that a demurrer was filed to the amended petition in this case and was overruled. There are no depositions of the parties or witnesses in this case; and no requests for admissions or answers thereto. The issue drawn here on motion for summary judgment is based solely upon the affidavits filed by the defendant in support of the motion for summary judgment and the counteraffidavits filed by the plaintiffs. Before we examine the evidence, we state here the applicable rules with reference to the determination of the issues before us on a motion for summary judgment. The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial. Hall v. Hadley, 173 Neb. 675, 114 N. W. 2d 590. On examination of the evidence on a motion for summary judgment, this court examines the evidence, not to decide any issue of fact presented, but only to discover if there is any real issue of fact that exists under the pleadings and the affidavits, and the supporting documents to the motion. Hall v. Hadley, *supra;* Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244. The burden is upon the party moving for a summary judgment to show that no issue of fact exists and unless he can conclusively do so, the motion must be overruled. In considering a motion for summary judgment, the court should view the evidence in the light most favorable to the party against whom it is directed. It is further true that in cases involving the credibility of witnesses, summary judgment does not permit a trial by affidavits if either party objects. Hall v. Hadley, *supra;* Illian v. McManaman, *supra.* A motion for summary judgment may be used by a defendant to assert a defense if there is no genuine issue of fact, but only a question of law. See 3 Barron and Holtzoff, Federal Practice & Proce-

dure, § 1244, p. 203. We first determine whether the plaintiffs have stated a cause of action and the nature of the issues raised by their pleadings. We may summarize the rule as to the rights of the parties as to trade names in a particular locality as follows: "* * * where a party has acquired a trade name in a particular locality he is entitled to protection against unfair competition in his particular line of business by the use of a competitor of a name of such similar import as to probably deceive the public." Peterson & Co. v. Jay, 158 Neb. 305, 63 N. W. 2d 174. See, also, Riggs Optical Co. v. Riggs, 132 Neb. 26, 270 N. W. 667; Regent Shoe Mfg. Co. v. Haaker, 75 Neb. 426, 106 N. W. 595; First National B. & T. Co. of Kalamazoo v. First National Credit Bureau, 364 Mich. 521, 111 N. W. 2d 880. Proof of fraud or deliberate deception is not necessary to establish unfair competition under the above holding. It appears that the rule is that if there is a substantial similarity leading to confusion, it is deemed unfair when it exploits to the plaintiffs' damage a name, the value of which plaintiff has created. First National B. & T. Co. of Kalamazoo v. First National Credit Bureau, *supra*. In Personal Finance Co. v. Personal Loan Service, 133 Neb. 373, 275 N. W. 324, the plaintiff had been in business in Lincoln since 1931, and the defendant, using the name "Personal Loan Service," became incorporated as such and began business in 1935. The court upheld an injunction in that case. It is unnecessary to go into the detailed evidence introduced in that case. The principle announced by the court is as follows: "If then it can be said that ordinary persons, dealing with ordinary caution, are likely to be misled, then it follows that deception is the natural and probable result of the defendant's acts. *Either actual or probable deception, or confusion, must be shown to entitle the plaintiff to the protection of the rule. This is usually accomplished by showing circumstances from which courts might justly conclude that persons are likely to transact business with one party*

under the belief they are dealing with another. Where there is no probability of deception, there can be no unfair competition." (Emphasis supplied.)

Tested by the principles laid down in these cases, the plaintiffs' petition states a cause of action. The allegations clearly state the acquisition of a trade name, the actual use by the defendant of names of similar import on Seventh Street in Lexington, and deception, confusion, and diversion of the plaintiffs' business by virtue of said use. The defendant, therefore, must pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. Knoll v. Knoll, 173 Neb. 602, 114 N. W. 2d 40; Peterson v. George, 168 Neb. 571, 96 N. W. 2d 627. The defendant attempts to meet this burden in this respect by the following:

1. An answer denying all of the material allegations of the amended petition (except the admissions hereinbefore specifically pointed out), and an extensive pleading in the answer to the effect that it has an absolute right to use the names which it admits it is using by virtue of assignment of these names from another corporation and partnership that had used them in the areas of North Platte and Ogallala.

2. An affidavit including 23 pages of exhibits restating the allegations of assignment in its answer, the substance of which is that the defendant was incorporated on August 27, 1958, and subsequently thereto registered trade names which it had acquired by assignment from separate legal entities at North Platte and Ogallala that had been using the various names mentioned herein in those localities for many years.

3. Upon the vital issue of deception or confusion, the sole evidence on behalf of the defendant is an affidavit of members of the board of directors made on July 8, 1961, stating that the directors or officers of the corporation, or any other person in any way connected with said corporation never had, or does not now have, and

did not have at the time of the creation of the corporation, "* * * any intent to mislead or deceive any one by the use of the names 'Sixth Street', 'Sixth Street Food Stores', 'Sixth Street Food Store of Lexington, Inc.', 'Sixth Street Food Store' or 'Sixth Street Market' * * *." This affidavit alleges no facts in connection with confusion or misdirection or deception of the public, but simply goes on to generally allege that it never had any intent to deceive, mislead, confuse, or to divert the customers of the plaintiffs into dealing with the defendant.

The plaintiffs' affidavits generally controvert the affidavits of the defendant filed herein, and they allege that plaintiffs' customers have been deceived into believing that they are dealing with the plaintiffs when they are dealing with the defendant; that advertisements by the defendant result in customers coming to plaintiffs' place of business demanding special bargains which are currently being offered by the defendant; that plaintiffs receive bills, statements, shipments of freight and goods, and correspondence intended for defendant; that similar items intended for the plaintiffs are received by the defendant; that said actions are costly, damaging, and are a nuisance; and again restates factually the sending of the letter of August 29, 1958, notifying the defendant to cease and desist from the use of the names involved herein.

The answer to the question as to whether any genuine issue of fact remains in this case is apparent. It surely could not be said that a mere denying of the intent to deceive, or to cause confusion, or to divert the business of the plaintiffs reaches the level of showing conclusively that the plaintiffs' allegation as to diversion, confusion, and deception is untrue as a matter of law. It further appears conclusively that even if by remote inference, we could draw such a conclusion from the defendant's affidavits, that the plaintiffs' responsive affidavits are amply sufficient to affirmatively demonstrate that there

are genuine issues of fact remaining to be tried in this case. There is no piercing of the pleadings in this case. We are aided by nothing more than the ex parte affidavits of the parties. It is apparent, also, that the credibility of the witnesses as to all of the areas covered in the affidavits needs to be tested by cross-examination and the other protection of a trial on its merits. Appropriate and pertinent here is our holding in Illian v. McManaman, *supra,* in which our court quoted with approval from Ford v. Luria Steel & Trading Corp., 192 F. 2d 880, wherein it was held: "It has become settled law that a genuine issue as to a material fact cannot be tried and determined upon affidavits, and that it must conclusively be shown that there is no such issue in the case and that the moving party is entitled to judgment as a matter of law, before a summary judgment can lawfully be entered."

We hold that the allegations of the plaintiffs' petition as to deception, confusion, and diversion of business have not been pierced by the showing made here; and that a genuine issue of fact exists, not only with respect to such issues, but as to the credibility of the witnesses who, so far, have only been heard in testimony in the ex parte affidavits.

It is fundamental that a general denial does not pierce the pleadings to destroy material issues raised by the pleadings. Without repeating them, we further point out that the other issues in the plaintiffs' petition, except those admitted by the defendant's answer, remain as issues and must be tried on their merits.

The defendant further argues strenuously that it is entitled to summary judgment because it has conclusively established that it is entitled to use the trade names in controversy in this case as a matter of law. This contention is based upon the allegations, supported by affidavits, that it acquired the trade names in question by appropriate assignment from corporations and partnerships who had previously used them in North

Platte and Ogallala, Nebraska; and that it filed the said trade names with the Secretary of State's office pursuant to law. It is significant that these acquisitions were made after the incorporating of the defendant on August 27, 1958, and within a month after notification from the plaintiffs, admitted by the defendant, demanding that it cease and desist in the use of the names. It is apparent that the maximum reach of the defendant's position in this respect could be no better than that of its predecessors in interest. Plaintiffs allege that they have been in business in Lexington since April 1950. The Trade Name Registration Act, so far as pertinent here, sets out in section 87-201, R. R. S. 1943, as follows: "* * * Provided, that sections 87-201 to 87-207 shall not apply to any person engaged in business under a trade name prior to August 27, 1951, unless and until such person elects to register his trade name without knowledge that a person had been engaged in business under the same trade name prior to August 27, 1951."

It is obvious from this, that the plaintiffs had a valid trade name or names in use in Lexington, Nebraska, on August 27, 1958, when the defendant became incorporated. This being true, it added nothing to the defendant's case to register the trade name. Our court said in Peterson & Co. v. Jay, *supra,* that the protection afforded one who files a brand name with Secretary of State is not substantially different from that granted to one who has adopted and used a brand name but has not recorded it with the Secretary of State and the remedy in each instance is for wrongful infringement of a use which presents a reasonable likelihood of deception. We further held in Personal Finance Co. v. Personal Loan Service, *supra,* that the issuance of the permit by the Secretary of State was purely a ministerial act; and that the courts do not need to recognize the finding of fact made by an officer of the executive department as binding upon it, as to justiciable questions.

One further contention of the defendant remains to

be disposed of. It argues that descriptive terms or generic words or geographical terms are not susceptible of exclusive appropriation. The cases it cites do not support that conclusion when applied to the particular situation we have before us here. It is true that the term "market," or the term "grocery," may be usually identified as generic in nature. It is also true that the term "Sixth Street" on its face relates to a geographical location, although under the particular circumstances in this case, one of the testing issues of facts is whether it is deceptive when actually used in the geographical location of Seventh Street in Lexington, Nebraska. While it is true that ordinarily generic adjectives or names commonly used to describe a business may not be appropriated as a trade mark, yet if there is a combination of geographical names used in conjunction with generic words in such a manner as to create a deceptive use under particular circumstances, then such use may be actionable. In Regent Shoe Mfg. Co. v. Haaker, *supra,* we said as follows: "It is an infringement on a legally acquired trade-name to use in the same locality and in the same line of business another name of such similar import that the ordinary attention of persons or customers would not disclose the difference between the two names." This follows the general rule that a combination of geographical names with other symbols or marks, even though the geographical name itself may not be a valid trade mark, may be protected against unfair competition. 87 C. J. S., Trade Marks, Etc., § 43, p. 274. If the resemblance is such as to mislead purchasers or those doing business with the company, and who are acting with ordinary and reasonable caution, or if it is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief. Iowa Auto Market v. Auto Market & Exchange, 197 Iowa 420, 197 N. W. 321. There is no merit, therefore, in the contention of the defendant that

it is entitled to appropriate the use of these names as a matter of law.

From what has been said, it is clear that there are genuine issues of fact as to all of the material allegations of the plaintiffs' petition herein; that these allegations constitute a cause of action, and have not been pierced to demonstrate conclusively that there is no genuine issue of fact; and that this case must be tried on its merits.

The judgment, therefore, is reversed and the cause remanded with directions to try the case on its merits and for proceedings in conformity with this opinion.

REVERSED AND REMANDED.

IN RE ESTATE OF THEODORE B. DORSHORST, DECEASED. ELLA MAE DORSHORST, APPELLEE, V. HAROLD T. DORSHORST, ADMINISTRATOR OF THE ESTATE OF THEODORE B. DORSHORST, DECEASED, ET AL., APPELLANTS.

120 N. W. 2d 32

Filed March 1, 1963. No. 35394.

1. **Trial.** An order affecting a substantial right in an action is a final order when it in effect determines the action and prevents a judgment.
2. **Appeal and Error.** Under the provisions of section 25-1914, R. R. S. 1943, but one $75 cost bond is required even though there are multiple appellants.
3. **Marriage: Dower.** Antenuptial contracts were void at common law, and did not constitute a bar to dower.
4. **Marriage: Descent and Distribution.** The right of a husband or wife to bar his or her right of inheritance by a contract made in lieu thereof before marriage is statutory in this state.
5. ———: ———. The right to make an antenuptial contract being statutory and in derogation of the common law, the manner prescribed by statute for exercising the right is a condition upon which the right exists.
6. ———: ———. When an antenuptial contract is not acknowledged as required by section 30-106, R. R. S. 1943, it is void for failure to comply with a statutory condition that is essential to the existence of the right to make such a contract.

Appeal from the district court for Sheridan County: ALBERT W. CRITES, Judge. Motion to dismiss appeal overruled. Judgment affirmed.

Gantz, Hein & Moran and Duane L. Mehrens, for appellants.

Fisher & Fisher, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an appeal from a judgment of the district court for Sheridan County sustaining a motion by plaintiff for judgment on the pleadings and a further motion for a summary judgment. The defendants appealed.

The record shows that Theodore B. Dorshorst died intestate on November 14, 1961. On November 20, 1961, a petition for the probate of the estate of Theodore B. Dorshorst was filed in the county court of Sheridan County and in due time letters of administration were issued to Harold T. Dorshorst. The petition shows that the deceased left surviving him his widow, Ella Mae Dorshorst, the plaintiff below, and one son and four daughters, the defendants below.

On January 23, 1962, Ella Mae Dorshorst filed her petition in the county court for a widow's allowance, for the setting aside of the homestead, and the setting aside of exempt property. The administrator filed an answer asserting an antenuptial agreement between the widow and the deceased as a defense to any recovery by the widow. After a hearing the county court found for the widow and made allowances to her. The defendants appealed to the district court, where like issues were made up by the pleadings. Motions for judgment on the pleadings and for a summary judgment were filed by the plaintiff. The trial court sustained the motions to the extent of holding that the antenuptial agreement was not a defense as a matter of law and reserved the

question as to the amount of property to be assigned the widow on her petition for widow's allowances. The defendants appealed to this court.

The plaintiff filed a motion in this court to dismiss the appeal for the reason that the order sought to be reviewed is not a final order and for the further reason that only one $75 bond for costs was filed. The only contested issue raised by the pleadings is the sufficiency of the antenuptial agreement as a defense to the petition for the widow's allowances. The judgment of the district court finally determines that question and is an appealable order. It affects a substantial right. Its effect is to determine the action by preventing a judgment for the defendants. § 25-1902, R. R. S. 1943. An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto. Western Smelting & Refining Co. v. First Nat. Bank, 150 Neb. 477, 35 N. W. 2d 116; Rieger v. Schaible, 81 Neb. 33, 115 N. W. 560, 17 L. R. A. N. S. 866. The contention that the appeal should be dismissed because but one $75 cost bond was filed when there was a multiple appeal is not well taken. Only one $75 cost bond is required. § 25-1914, R. R. S. 1943. The motion to dismiss the appeal is overruled.

The record discloses that the trial court sustained plaintiff's motion for judgment on the pleadings. The court thereafter sustained plaintiff's motion for summary judgment. The sustaining of the motion for judgment on the pleadings disposed of the issue before the court. Nothing remained which was subject to a motion for summary judgment. We shall disregard the purported summary judgment and decide the case on the question as to whether or not the sustaining of the motion for judgment on the pleadings was correct.

The ultimate decision of the case depends on the validity or nonvalidity of the antenuptial contract pleaded in the defendants' answer. The record shows

that on September 17, 1958, Theodore B. Dorshorst, the deceased, and Ella Mae Dorshorst, formerly Ella Mae Tiensvold, in contemplation of marriage, entered into a written antenuptial agreement by which each agreed that if one survived the other, the survivor would make no claim against the other's estate, and each one expressly waived all marital rights in the estate of the other. Each had been previously married and each had children by the former marriage. Each had real and personal property in his own right. The agreement was signed by the contracting parties and witnessed. It was not acknowledged, as required by section 30-106, R. R. S. 1943. This section of the statute requires that an antenuptial contract shall be acknowledged in the manner required by law for the conveyance of real estate.

The common law of England to the extent that it is not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed by the Legislature of this state, has been adopted as the law of this state. § 49-101, R. R. S. 1943. Antenuptial contracts were not recognized by the common law of England. In fact, antenuptial contracts were void at common law and did not constitute a bar to dower. Rieger v. Schaible, *supra*. This being true, a valid antenuptial contract can exist only by statute in this state.

This principle is recognized in Smith v. Johnson, 144 Neb. 769, 14 N. W. 2d 424, where a postnuptial contract, also void at common law, was held void in this state because it was not authorized by statute.

Section 30-106, R. R. S. 1943, provides: "A man or woman may also bar his or her right to inherit part or all of the lands of his or her husband or wife by a contract made in lieu thereof before marriage. Such contract shall be in writing signed by both of the parties to such marriage and acknowledged in the manner required by law for the conveyance of real estate, or ex-

ecuted in conformity with the laws of the place where made."

The defendants contend that the foregoing section of the statutes is not exclusive and that antenuptial contracts may be enforced when not executed in conformity with the statute. The use of the words "may also bar his or her right to inherit," used in the statute do not appear to sustain this theory. In 1907 the Legislature adopted a new statute in this state providing for the succession to the estates of decedents. It purports to be an all-inclusive statute on this subject. Laws 1907, c. 49, p. 193. Dower and courtesy were abolished by this act. It provided for the descent of all property to the husband or wife and to heirs which had not been lawfully conveyed or devised. By section 5 of the act it provided how certain property may be barred from the right of inheritance. Section 6 of the act provided that "A man or woman may also bar his or her right to inherit" by an antenuptial contract in writing signed and acknowledged before marriage in the manner required by law for the conveyance of real estate. It is clear that the "may also bar" the right to inherit provision was intended to be in addition to the provisions of section 5 and not in addition to other forms of antenuptial contracts not referred to in the statute. We conclude that section 30-106, R. R. S. 1943, does not of itself indicate that it was intended to be nonexclusive in character.

The defendants argue that it has been interpreted by the courts to be nonexclusive, and cite Rieger v. Schaible, *supra,* in support of their contention. The antenuptial contract in the foregoing case was entered into prior to the enactment of chapter 49, Laws 1907. The formalities of the execution of the antenuptial contract were in compliance with the existing statute. The agreement was not within the terms of the existing statute in that no jointure was settled upon the wife,—no freehold estate in the lands of her intended husband were received by her, a then existing condition to the making

of a valid antenuptial contract. The case holds that although the statute was not complied with it is not exclusive and that an antenuptial contract not in compliance with the statute will be enforced in equity in the absence of any contravening equitable considerations. It must be conceded that this case holds that the statute prior to 1907 was not exclusive and that antenuptial contracts, nonconformable to the statute existing at that time, could be enforced in a court of equity if fairly and voluntarily entered into. To this extent the case does support the contentions of defendants in the case at bar. We cannot, however, agree with the logic of that case.

The cases from other jurisdictions which hold that statutes providing for antenuptial contracts are not exclusive and may be enforced in a court of equity, even if void under the statute, do not indicate that such states have adopted the common law of England as the common law of their respective states by statutes similar to section 49-101, R. R. S. 1943. Since the common law of England did not recognize antenuptial contracts as valid, valid antenuptial contracts in this state exist only by statute. They being in derogation of the common law, they can exist to the extent and may be created only in the manner prescribed by the Legislature. A compliance with the legislative form by which a valid antenuptial contract may be made is essential since the manner of its creation is an integral part of the existence of the right. Billiter v. Parriott, 128 Neb. 238, 258 N. W. 395. In Smith v. Johnson, *supra,* this court in discussing sections 30-105 and 30-106, R. R. S. 1943, stated: "We think the statutory method of barring the right of inheritance is limited to the methods outlined in the foregoing sections of the statutes." See, also, Focht v. Wakefield, 145 Neb. 568, 17 N. W. 2d 627. The correct rule is announced in Smith v. Johnson, *supra,* and we overrule Rieger v. Schaible, *supra,* insofar as it is in conflict therewith. This leads us to the conclu-

sion that the antenuptial contract in the case at bar is void in that it is not acknowledged as required by section 30-106, R. R. S. 1943.

Defendants argue that we held an unacknowledged antenuptial contract valid in Erb v. McMaster, 88 Neb. 817, 130 N. W. 576. In that case the unacknowledged contract provided that the husband waived all marital rights in the wife's property except the sum of $1,000, which was to be paid to him if his wife died first. Before her death the wife paid her husband $330 and took a receipt showing that it was accepted as a payment on the antenuptial contract. The court did not hold the contract to be valid. We there said: "Even if the contract were wholly invalid, which we do not decide, under these circumstances the plaintiff is estopped to allege its invalidity." Such cases lend no support to defendants' contention that antenuptial contracts lacking conformity with section 30-106, R. R. S. 1943, have been held valid by this court, other than has been quoted from Rieger v. Schaible, *supra*.

We have no question of estoppel in the case at bar. It was neither pleaded nor briefed. There is no assignment of error with reference thereto. The only question raised by this appeal is the validity of the antenuptial contract. Our holding that the antenuptial contract is void disposes of the litigation. The trial court having arrived at the same conclusion the judgment is affirmed.

MOTION TO DISMISS APPEAL OVERRULED.
JUDGMENT AFFIRMED.

INDEX

Actions.

1. A person who has an interest in the matter in litigation and in the success of either party to an action has a right to intervene in the litigation either before or after the issue has been joined and before the trial begins. Workman v. Workman ---------- 471
2. An action is commenced at the date of the summons served upon the defendant or on the date on which the defendant enters a voluntary appearance. Gorgen v. County of Nemaha ---------- 588
3. The plaintiff is required to file a praecipe stating the names of the parties to the action with demand that summons issue therefor. Gorgen v. County of Nemaha ---------- 588

Adverse Possession.

The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted. Krimlofski v. Matters ---------- 774

Affidavits.

1. Affidavits used as evidence on the hearing or trial of any issue of fact must have been as a prerequisite to examination of them in the Supreme Court, identified and offered in evidence in the trial court and embodied in a bill of exceptions. Arla Cattle Co. v. Knight ---------- 360
2. Where the venue is omitted from an affidavit there is a presumption that the officer acted within his jurisdiction. State ex rel. Brogan v. Boehner ---- 689
3. A genuine issue as to a material fact cannot be tried and determined upon affidavits, and this is especially true where the credibility of witnesses is involved. Ransdell v. Sixth Street Food Store ---------- 875

Appeal and Error.

1. A court of equity should, upon proper application,

be sure that the rights of all persons before it are protected and that they be given the right to appeal from an adverse judgment. State ex rel. City of Grand Island v. Tillman ---------- 23
2. The Supreme Court will not take judicial notice of the rules of practice of the district court. Nile Valley Fed. Sav. & Loan Assn. v. Schank -------- 35
3. Before rules of practice of a district court may be given consideration in a determination of a question presented to the Supreme Court, they must be incorporated in the bill of exceptions. Nile Valley Fed. Sav. & Loan Assn. v. Schank ---------- 35
4. In the absence of a bill of exceptions, it is presumed that issues of fact presented by the pleadings were established by the evidence and that they were correctly decided. The only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. Nile Valley Fed. Sav. & Loan Assn. v. Schank ---------- 35
Arla Cattle Co. v. Knight ---------- 360
5. In the absence of a bill of exceptions containing the evidence, an order made by the district court confirming a sale of real estate will be presumed to be correct and supported by sufficient evidence. Nile Valley Fed. Sav. & Loan Assn. v. Schank -------- 35
6. Rule for trial de novo of equity case in Supreme Court stated. Hansen v. Commonwealth Co. ---- 70
McCubbin v. Village of Gretna ---------- 139
Karpisek v. Cather & Sons Constr., Inc. -------- 234
7. Objection to the admission of evidence cannot be considered by the Supreme Court for some reason not properly and timely raised at the trial. Erving v. State ---------- 90
8. It is no part of the duty of the Supreme Court to search a voluminous record for the purpose of ascertaining if there is error in it. Erving v. State ---- 90
9. The function of an assignment of error is to specifically point out the exact instance of the alleged error. Erving v. State ---------- 90
10. In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of the Supreme Court require that appropriate reference be made to the specific evidence against which objection is urged. Erving v. State -------- 90
11. Affidavits used as evidence on the hearing of an issue of fact must be offered in evidence in the trial court and embodied in a bill of exceptions to be avail-

able to appellant in the Supreme Court. State v. Kent ---------- 115
12. The Supreme Court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that the court can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Kent ---------- 115
13. View of the premises by trial court should be given consideration by the Supreme Court on appeal. McCubbin v. Village of Gretna ---------- 139
14. An appeal in a workmen's compensation case is considered and determined de novo on the record in the Supreme Court. Seymour v. Journal-Star Printing Co. ---------- 150
15. A judgment will not be reversed for errors against a party not entitled to succeed in any event. Knuth v. Singer ---------- 182
16. When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof of the facts sought to be put in evidence by the question in order to present the ruling to the Supreme Court for review. Cook v. Ketchmark ---------- 222
17. A failure to instruct the jury upon the issues presented by the pleadings and evidence, whether requested to do so or not, is prejudicial error. Omey v. Stauffer ---------- 247
18. Instructions which are inconsistent and tend to mislead and confuse the jury are erroneous and prejudicial. Omey v Stauffer ---------- 247
19. An instruction on the burden of proof which fails to inform the jury as to what its verdict should be in the event the evidence is equally balanced or preponderates in favor of the defendant is prejudicially erroneous. Omey v. Stauffer ---------- 247
20. The giving of an oral instruction to the jury in regard to the principles of law applicable to the case and to the evidence, without a waiver of the statutory requirement that it be in writing, is reversible error. Omey v. Stauffer ---------- 247
21. Under statute providing for appeal in misdemeanor cases, there are no exceptions to the right of appeal where the appeal is taken within the time and in the manner and form required in the statute. State v. Norwood ---------- 255
22. It is not the province of the Supreme Court in re-

viewing the record in an action at law to resolve conflicts in or weigh the evidence. Hopwood v. Voss -- 304
23. Disputed questions of fact in an action at law are by the verdict of the jury resolved in favor of the prevailing party and in deciding an appeal the evidence and reasonable inferences therefrom are required to be considered most favorably to him. Hermansen v. Anderson Equipment Co. ---------- 325
24. When a certain theory as to the measure of damages is relied upon by the parties in the trial court as the proper one, it will be adhered to on appeal whether correct or not. Haarberg v. Schneider ---------- 334
25. Where a motion for a new trial presents a question of fact as to the regularity of the proceedings, the trial court becomes the trier of the facts, and its decision thereon will not be disturbed on appeal unless clearly wrong. Haarberg v. Schneider ---------- 334
26. The Supreme Court on appeal will consider only those assignments of error which are argued in the brief of the appellant. Arla Cattle Co. v. Knight ------ 360
27. Rule for trial de novo of divorce action stated. Harding v. Harding ---------- 371
Ross v. Ross ---------- 795
28. In an action involving the custody of minor children, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review. Harding v. Harding ---------- 371
29. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown. State v. Brown ---------- 387
30. Before an error requires a reversal it must be determined that it was prejudicial to the rights of the party against whom it was made. Workman v. Workman ---------- 471
31. The plaintiff appealing to the district court from a judgment rendered in municipal court in favor of the defendant therein must file his petition on appeal within 50 days from the date of the rendition of judgment in the municipal court unless the district court for good cause shown shall otherwise order. Pep Sinton, Inc. v. Thomas ---------- 508
32. If the plaintiff on appeal fails to file his petition within the prescribed time and the district court by

order overrules his motion to file the same out of time, it is the duty of the district court on motion of the defendant to enter judgment against the plaintiff, unless the order is vacated or modified. Pep Sinton, Inc. v. Thomas ---------- 508

33. An order of the district court overruling a motion of the plaintiff to file a petition on appeal from the municipal court after the expiration of 50 days from the judgment rendered therein is a final order. Pep Sinton, Inc. v. Thomas ---------- 508

34. Rule stated as to procedure upon appeal from an order granting a new trial. Main v. Sorgenfrei --- 523

35. On appeal from an order granting a new trial, the duty rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. Main v. Sorgenfrei ---------- 523

36. The appellant then in reply has the right, if he desires, of meeting this contention. Main v. Sorgenfrei ---------- 523

37. On review in the Supreme Court of an order granting a new trial, there is no burden in the sense of a burden of proof upon either party. Main v. Sorgenfrei ---------- 523

38. The burden is upon all parties to assist the court to a correct determination of the question or questions presented. Main v. Sorgenfrei ---------- 523

39. In a condemnation action when the evidence is conflicting, the verdict of the jury will not be set aside, unless it is shown to be clearly wrong. O'Neill v. State ---------- 540

40. The judge presiding at a trial must conduct it in a fair and impartial manner. A remark or comment which is shown to be prejudicial to the rights of the party complaining, or which is such that it may be assumed prejudice will result therefrom, is fatal to the validity of the trial. State v. Goff ---------- 548

41. When evidence is conflicting, the verdict of a jury, or the finding of fact by a court in a law action for damages where a jury is waived, will be set aside where manifestly excessive and clearly wrong. State v. Dillon ---------- 560

42. In a case where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed. Everett v. Hening ---------- 573

43. When an appeal is taken from a judgment of the

county court denying the admission of a will to probate, the party appealing is required to file a petition on appeal within 50 days from the date of the rendition of such judgment unless the court, on good cause shown, shall otherwise order. Leu v. Swenson 591

44. Whether or not good cause is shown to permit a filing of the petition out of time upon appeal is a question of fact. The finding and judgment of the trial court thereon will not ordinarily be disturbed on appeal unless an abuse of discretion is shown. Leu v. Swenson ---------- 591

45. The Supreme Court, upon appeal from an order denying permission to file a petition out of time, will assume that the finding and judgment of the trial court are correct in the absence of a bill of exceptions. Leu v. Swenson ---------- 591

46. When a court reporter is unable to prepare and certify a bill of exceptions, a bill of exceptions shall be prepared under the direction and supervision of the trial judge upon request and shall be certified by the judge and delivered to the clerk of the district court, as provided by the rules of the Supreme Court. Leu v. Swenson ---------- 591

47. The action of a trial court in proceeding, over objection, with a trial or hearing without a court reporter is reversible error if the litigant is prejudiced thereby. There is no prejudice where a bill of exceptions could have been obtained under the rules of the Supreme Court if a bill had been requested. Leu v. Swenson ---------- 591

48. The admission of immaterial or irrelevant evidence in a trial to the court is not reversible error. State ex rel. Weiner v. Hans ---------- 612

49. A proceeding under the Juvenile Court Act is a special statutory proceeding and the review in the Supreme Court of such a proceeding is by trial de novo. State ex rel. Weiner v. Hans ---------- 612

50. Upon a review in the Supreme Court by trial de novo, the court will disregard evidence which should not have been admitted by the trial court. State ex rel. Weiner v. Hans ---------- 612

51. An instruction on the measure of damages permitting recovery for future pain and suffering when there is no competent evidence to support the same is prejudicial error. Herndon v. Crawford ---------- 618

52. In order that assignments of error as to the admission or rejection of evidence may be considered, the

holdings of the Supreme Court require that appropriate reference be made to the specific evidence against which objection is urged. Reller v. City of Lincoln ---------- 638

53. When the court adequately instructs upon an issue presented by the pleadings or evidence, it is not error to refuse to give a tendered instruction covering the same subject matter. Reller v. City of Lincoln ---- 638

54. An issue not presented in the trial court may not be raised for the first time in the Supreme Court. Jones v. Village of Farnam ---------- 704

55. Instructions set out in the opinion are held not to be erroneous. Huetter v. Cascio ---------- 771

56. The efficacy of a correct decision by a court is not diminished or destroyed by the assignment or the adoption of an erroneous reason for it. Elander v. Kellogg Grain Co. ---------- 782

57. The Supreme Court is not limited to the reason by virtue of which a district court made a decision. Elander v. Kellogg Grain Co. ---------- 782

58. In a case where evidence has been wrongfully admitted, the admission will be regarded as prejudicial unless it clearly appears that it did not affect unfavorably the party against whom it was admitted. Grantham v. Farmers Mutual Ins. Co. ---------- 790

59. Unless evidence wrongfully admitted in the trial of a jury case is shown not to have affected the result, its reception must be considered prejudicial error. Singles v. Union P. R.R. Co. ---------- 816

60. Under statute requiring cost bond of $75 on appeal, only one cost bond is required even though there are multiple appellants. Dorshorst v. Dorshorst -- 886

Assignments.

Ordinarily an assignment is not essential to the enforcement of a right of subrogation. Sheridan v. Dudden Implement, Inc. ---------- 578

Attorney and Client.

1. A party to a divorce action will not ordinarily be required to pay attorney's fees for the benefit of the wife's legal counsel in a case involving the wife's collateral and unjustified attack upon a decree of divorce which has become final. Card v. Card ------ 124

2. The purpose of statute referred to in opinion is to protect the public by making certain that the duties of county attorney are not influenced by private

interest. Where a conflict of interest is not shown, the statute has no application. Roach v. Roach ---- 266
3. Nature and extent of a general or retaining lien of attorney stated. Anderson v. Lamme ---------- 398
4. The right of an attorney at law to a general or retaining lien is not affected by the fact that the client is a personal representative and that the services were rendered and the money received on behalf of an estate. Anderson v. Lamme ---------- 398
5. Where the administrator of an estate is a lawyer and performs legal services which are necessary and beneficial to the estate, such services are extraordinary within the meaning of statute allowing compensation to an administrator, and the court may make an allowance as reasonable compensation for such services. Anderson v. Lamme ---------- 398

Automobiles.

1. By the terms of statute the maximum speed limit of a motor vehicle permitted at the intersection involved in this action was 25 miles an hour. Zager v. Johnson ---------- 106
2. By the terms of statute in force at the time of the accident involved here, where two motor vehicles approached an intersection at approximately the same time and within the maximum limit of speed provided, the driver of the one to the left was required to yield the right-of-way to the one to the right. Zager v. Johnson ---------- 106
3. By the terms of statute a driver of an automobile having the right-of-way at an intersection forfeits such right-of-way if he is driving in excess of the speed limit provided. Zager v. Johnson ---------- 106
4. Generally it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Schwartz v. Hibdon ---------- 129
5. Reasonable control by the operator of a motor vehicle is such as will enable him to avoid an accident involving another motor vehicle operated without negligence. Schwartz v. Hibdon ---------- 129
6. Duty of driver of motor vehicle being overtaken from the rear by another motor vehicle on the highway stated. Schwartz v. Hibdon ---------- 129
7. Where one driving a motor vehicle is suddenly confronted by an emergency, requiring instant decision,

he is only required to demean himself as an ordinary, careful, and prudent person would have done under like circumstances, and if he does that he is not held to be negligent. Schwartz v. Hibdon ---- 129

8. The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it. Schwartz v. Hibdon ---------- 129

9. Where the driver of a motor vehicle upon a public highway, in attempting to pass another vehicle from the rear, operates his vehicle in such a manner as to strike the other vehicle in passing, he is ordinarily guilty of negligence when the driver of the vehicle being passed is without fault. Schwartz v. Hibdon-- 129

10. Conditions affecting the visibility of a motorist impose upon the driver the duty to exercise a degree of care commensurate with existing circumstances. Schwartz v. Hibdon ---------- 129

11. A motorist overtaking and passing another motor vehicle must exercise vigilance commensurate with the surrounding circumstances. Schwartz v. Hibdon 129

12. The right to stop when the occasion demands is an incident to the right to travel. Knuth v. Singer ---- 182

13. A municipal ordinance which decreases the speed limit from that otherwise prescribed by statute is effective only when appropriate signs giving notice thereof have been erected. Omey v. Stauffer ------ 247

14. An instruction relating to the duty to give an appropriate signal before turning a motor vehicle from a direct course upon a highway is incomplete if it fails to instruct as to the signals which are authorized and required. Omey v. Stauffer ---------- 247

15. A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it. Gross v. Johnson ---------- 273

16. Duty of motorist approaching a highway protected by stop signs stated. Gross v. Johnson ---------- 273

17. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view. Gross v. Johnson ---------- 273

18. It is a question for the jury as to whether a motorist failed to observe a motor vehicle approaching on the highway except where the evidence is conclusive that

the approaching motor vehicle was within the limit of danger. Hermansen v. Anderson Equipment Co. 325
19. The driver of a motor vehicle is not required to notice every car that happens actually to be within his range of vision, but only those within that radius which denotes the limit of danger. Hermansen v. Anderson Equipment Co. ---------- 325
20. Before a verdict can be properly directed, the position of the oncoming motor vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger; otherwise the question becomes one for the jury. Hermansen v. Anderson Equipment Co. ---------- 325

Bills and Notes.

1. In an action on a promissory note, lack of consideration is an affirmative defense. Caldwell v. Wells -- 288
2. In an action on a promissory note, the lack of delivery of the note is an affirmative defense. Caldwell v. Wells ---------- 288
3. Where a personal check has been accepted by a lessor, the lessor is obligated to present the check for payment and cannot declare the lease terminated unless payment is refused. Willan v. Farrar ---------- 826

Burglary.

1. An attempt to commit any of the acts prohibited by burglary statute constitutes the criminal offense of attempted burglary as that offense is defined. State v. Hoye ---------- 409
2. Anyone attempting to break and enter a storehouse is guilty of the offense of attempted burglary. State v. Hoye ---------- 409
3. A storehouse, within the meaning of the statute, is some kind of structural barrier to ingress of the public. State v. Hoye ---------- 409
4. A gasoline tank used for storage of gasoline for the purposes of the owner not connected with or a part of another structure is a storehouse within the meaning of the statute. State v. Hoye ---------- 409

Cemeteries.

1. The establishment, ownership, conduct, and management of cemeteries, except those owned, operated, and maintained by towns, villages, churches, and by fraternal and benefit societies, are governed by the

provisions of the Cemetery Association Act. Root v. Morning View Cemetery Assn. ---------- 438
2. By the terms of the statute, cemetery associations are empowered to receive gifts, devises, and bequests to be used in the performance of their functions. Root v. Morning View Cemetery Assn. ---------- 438

Charities.

1. A gift of property by will to an existing cemetery association is a gift to a charitable trust to be used for the purpose indicated in the will, and if no specific purpose is specified, then in the performance of the lawful objects and purposes of the cemetery association. Root v. Morning View Cemetery Assn. 438
2. In case of the failure of the charitable purpose of a gift by will to a cemetery association, the gift would pass to the heirs of the testator, and they would be proper parties to maintain action for recovery thereof. Root v. Morning View Cemetery Assn. ---------- 438

Chattel Mortgages.

1. The description of property in a chattel mortgage will as a rule be held sufficient where it will enable a third party, aided by inquiries which the instrument itself suggests, to identify the property. Elander v. Kellogg Grain Co. ---------- 782
2. Rule as to sufficiency of description in chattel mortgage stated. Elander v. Kellogg Grain Co. ------ 782
3. Where a mortgage describes a specific quantity out of a larger mass, until separation is made the most that the mortgagee can require is that the mass not be depleted below the quantity specified in the mortgage. Elander v. Kellogg Grain Co. -------- 782

Conspiracy.

1. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object or a lawful object by unlawful or oppressive means. Workman v. Workman -- 471
2. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Workman v. Workman ---------- 471

Constitutional Law.

1. Legislature cannot limit the inherent power of courts to punish for contempt. State ex rel. Beck v. Frontier Airlines, Inc. ---------- 172
2. Statute limiting punishment for contempt of court to a fine not exceeding $200 was unconstitutional. State ex rel. Beck v. Frontier Airlines, Inc. ------ 172
3. The power of the Governor to remove an officer of the executive branch of the government, appointed for a definite term, requires a sufficient specification of charges, notice, hearing, and adequate competent evidence to sustain the order made. State ex rel. Meyer v. Sorrell ---------- 340
4. Rules respecting court review of decision of Governor in removing an administrative officer where hearing is required stated. State ex rel. Meyer v. Sorrell -- 340
5. All evidence obtained by searches and seizures in violation of the federal Constitution is inadmissible in a criminal trial in the courts of this state. State v. Easter ---------- 412
   State v. Goff ---------- 548
6. The issues of unlawful arrest and unconstitutional search and seizure are questions for the trial court and are not subject to review by a jury. State v. Easter ---------- 412
7. The constitutional provision authorizing suit against the state is not self-executing. Legislative action is necessary to make it available. Gentry v. State ---- 515
8. Constitutional provision prohibiting the taking or damaging of property without compensation is self-executing and legislative action is not necessary to give it effect. Gentry v. State ---------- 515
9. All evidence obtained by searches and seizures in violation of the Fourth Amendment to the federal Constitution is, by virtue of the due process clause of the Fourteenth Amendment, inadmissible in a state court. State v. Goff ---------- 548
10. The Fourth Amendment's right of privacy is enforceable against the states through the due process clause of the Fourteenth Amendment. State v. Goff 548
11. A defendant in a criminal prosecution has a constitutional right to a public trial by an impartial jury. When it appears to the Supreme Court that a defendant has not been accorded a fair trial, its duty is to grant a new trial. State v. Goff ---------- 548
12. Constitutionality of separate juvenile court of Doug-

las County, Nebraska, is not determined. State ex rel. Weiner v. Hans ---------- 612
13. In this jurisdiction an opportunity to be heard with right of review upon the question of assessments for benefits is all that is required to satisfy the due process provisions of the Constitutions of Nebraska and the United States. Jones v. Village of Farnam 704
14. Statute regulating, restricting, or prohibiting ingress and egress to a state highway upon which the Department of Roads has established a limited or controlled access facility is not special legislation within the purview of Article III, section 18, of the Constitution. Fougeron v. County of Seward ---- 753
15. Statute limiting ingress and egress to a state highway is not violative of the due process clause of the Constitution, in failing to provide notice to landowners who suffer no compensable damages by the barricading of a county road. Fougeron v. County of Seward ---------- 753
16. A tenant for a term has a property right in land, which is protected by Article I, section 21, of the Constitution of Nebraska. Johnson v. City of Lincoln 837
17. The interpretation of the constitutional provision requiring a speedy trial is for the court, but the maximum time fixed by the Legislature is a reasonable one, and the Supreme Court adopts it as its own. State v. Fromkin ---------- 849

Contempt.

1. The power to punish for contempt of court is a power inherent in courts of general jurisdiction such as the district courts of this state. State ex rel. Beck v. Frontier Airlines, Inc. ---------- 172
2. The Legislature has no power to limit or interfere with the inherent power of district courts to punish for contempt of court. State ex rel. Beck v. Frontier Airlines, Inc. ---------- 172
3. Legislature cannot limit the inherent power of courts to punish for contempt. State ex rel. Beck v. Frontier Airlines, Inc. ---------- 172
4. Statute limiting punishment for contempt of court to a fine not exceeding $200 was unconstitutional. State ex rel. Beck v. Frontier Airlines, Inc. ---------- 172
5. A civil contempt action is concerned only with compliance with the judgment on the issues as they existed in the action which resulted in the judgment. Kasparek v. May ---------- 732

6. Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, such act is, ordinarily, a civil contempt. Kasparek v. May ---------- 732
7. A civil contempt has for its purpose the preservation and enforcement of the rights of private parties to suits, and to compel obedience to orders and judgments made to enforce private rights to which the court has found them to be entitled. Such a contempt is remedial and coercive in its nature, and affects the parties whose private rights and remedies are involved. Kasparek v. May ---------- 732
8. Proceedings in contempt are governed by the rules applicable to prosecutions by indictment, are in their nature criminal, and no intendments will be indulged in to sustain a conviction. It is necessary to establish guilt beyond a reasonable doubt. Kasparek v. May ---------- 732
9. The disobedience of an injunction must be willful before the breach thereof may be punished as a contempt. Kasparek v. May ---------- 732
10. Indemnity for damages cannot be secured in a contempt proceeding. Kasparek v. May ---------- 732
11. The power to punish for contempt is an essential attribute of a court of general jurisdiction. Kasparek v. May ---------- 732
12. Costs and expenses incurred by an injured party may be recovered in contempt proceedings from the contemner. Kasparek v. May ---------- 732

Continuances.

An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error. State v. Kent ---------- 115

Contracts.

1. The meaning of a doubtful word may be ascertained by reference to the meaning of the words associated with it. Sky Harbor Air Service v. Airport Authority ---------- 243
2. General and specific words, capable of analogous meaning when used together, take color from each other so that general words are restricted to a sense analogous to the less general. Sky Harbor Air Service v. Airport Authority ---------- 243

3. A practical construction put upon a contract by the parties cannot control the express, unambiguous provisions of the instrument. Sky Harbor Air Service v. Airport Authority ---------- 243
4. The rescission of a contract must be in toto and the parties must be placed in status quo so far as the circumstances will permit. Anson v. Grace ---------- 258
5. Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile. Anson v. Grace ---------- 258
6. Rescission by its nature implies the extinction of the contract which leaves the parties without a right of recovery on the contract itself. Anson v. Grace -- 258
7. Value of property is always a matter of judgment. A contract based upon inadequate consideration will not be set aside for that reason alone, unless the inadequacy is so great as to furnish of itself convincing evidence of fraud. Workman v. Workman ---- 471
8. An agreement, in order to result in a novation, must contain two stipulations: One to completely extinguish an existing liability, and the other to substitute a new one in its place. Sheridan v. Dudden Implement, Inc. ---------- 578
9. The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. Francis R. Orshek Co. v. State ---------- 668
10. In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification. Francis R. Orshek Co. v. State ------ 668
11. Where a contract is plain and unambiguous in its meaning, it will be enforced according to its terms. Francis R. Orshek Co. v. State ---------- 668
12. An express agreement declaring the rights of the parties flowing from a breach of a contract of guaranty prevails over the implied right of the guarantor to reimbursement. O. K. Door Co., Inc. v. Lincoln Eng. Constr. Co. ---------- 682

Corporations.

1. Where one availed himself of the privilege of doing business as a corporation, even though its sole shareholder, documents which he could have protected from seizure, if they had been his own, could be used

against him, even though they were illegally obtained from the corporation. State v. Easter ---------- 412
2. An officer or director of a corporation occupies a fiduciary relation to the corporation and to stockholders. He is treated by courts of equity as a trustee, and as such is ordinarily personally liable to beneficiaries of a fund for any misapplication of the fund to other beneficiaries not entitled thereto. Workman v. Workman ---------- 471
3. A court of equity will not permit mere corporate forms to serve as a cloak and a shield for the perpetration of a fraud, but will examine the whole transaction, looking through corporate forms to the substance of things to protect the rights of innocent parties. Workman v. Workman ---------- 471

Costs.

Costs and expenses incurred by an injured party may be recovered in contempt proceedings from the contemner. Kasparek v. May ---------- 732

Courts.

1. It is not the prerogative of a trial court to make an independent investigation of the issues between the parties when there is no provision of law providing for such an investigation. Caldwell v. Wells ------ 288
2. An independent investigation by a trial court is improper procedure and prejudicial when it is not authorized by statute. Caldwell v. Wells ---------- 288
3. A court will take judicial notice of pleadings, orders, and judgments appearing in the record of the case it has before it. Lewin v. Lewin ---------- 596
4. The county courts of this state have exclusive original jurisdiction in all matters of probate and the settlement of estates of deceased persons by virtue of Article V, section 16, Constitution of Nebraska. Lewin v. Lewin ---------- 596
5. Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceeding belongs. Lewin v. Lewin ---- 596
6. Where a court has jurisdiction of the subject matter, it has the power to determine by evidence whether or not the venue is established. Lewin v. Lewin ---- 596
7. Where a county court having jurisdiction of the subject matter determines from evidence that the venue of the action has been established and enters its judgment to that effect, such judgment, if no appeal

is taken therefrom, is a final adjudication of the issue. Lewin v. Lewin ---------- 596
8. Status of de facto court against collateral attack stated. State ex rel. Weiner v. Hans ---------- 612
9. Constitutionality of separate juvenile court of Douglas County, Nebraska, is not determined. State ex rel. Weiner v. Hans ---------- 612
10. Courts will not review or inquire into the legislative acts of municipal boards concerning matters within their power, as to whether they acted expediently, wisely, or necessarily. Such are matters of purely legislative function, and not of judicial concern. Jones v. Village of Farnam ---------- 704
11. The power to punish for contempt is an essential attribute of a court of general jurisdiction. Kasparek v. May ---------- 732
12. The journal of the district court is the official record of the judgments and orders of that court. Midwest Laundry Equipment Corp. v. Berg ---------- 747

Criminal Law.
1. In a criminal action the Supreme Court will not interfere with a verdict of guilty based on conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Wilson ---------- 86
State v. Kent ---------- 115
State v. Brown ---------- 387
State v. Burton ---------- 457
2. Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded. State v. Wilson ---------- 86
3. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. Erving v. State-- 90
State v. Easter ---------- 412
4. In crimes involving motive, criminal intent, or guilty knowledge, evidence of independent crimes wholly disconnected with the one charged may be received. Erving v. State ---------- 90
5. A defendant in a criminal case who testifies in his own behalf is subject to the same rules of cross-examination as any other witness. Erving v. State 90
6. Cross-examination of a witness upon a collateral matter to ascertain the credibility of a witness is

subject to the discretion of the trial court. Erving v. State ---------- 90
7. By statute, the term "felony" signifies such an offense as may be punished with death or imprisonment in the penitentiary. Erving v. State ---------- 90
8. A conviction by a court-martial is a felony within the Nebraska definition if the offense for which the conviction is had may be punished by imprisonment in a penitentiary. Erving v. State ---------- 90
9. To be available, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. Erving v. State ---------- 90
10. In a criminal case, the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written copies of statements and other documentary evidence for the inspection of defendant's counsel before trial. Error may be predicated only for an abuse of discretion. Erving v. State ---------- 90
11. An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error. State v. Kent ---------- 115
12. Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. State v. Kent ---------- 115
13. An appeal in a criminal case will not be dismissed because the notice of appeal fails to state the nature of the offense and the sentence imposed as required by statute. State v. Goff ---------- 217
14. Under statute defining an habitual criminal, the fact that defendant is so charged shall not be disclosed to the jury upon the trial of the main criminal offense. State v. Losieau ---------- 320
15. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed. State v. Losieau ---------- 320
16. In a criminal case where it is sought to have a

verdict of guilty set aside on the ground that the defendant did not have a fair trial on account of prejudice, the trial court has a large discretion in ruling on the question of prejudice. State v. Losieau 320

17. Under statute respecting trial in criminal cases, a motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of an abuse of discretion. State v. Brown ---------- 387

18. A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered. State v. Brown -------- 387
State v. Henry ---------- 432

19. Prior inconsistent and contradictory statements of a defendant which were voluntary are admissible for the purpose of impeachment. State v. Brown ---- 387

20. The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn from a consideration of the actions of the defendant viewed in the light of all surrounding circumstances. State v. Brown ---------- 393

21. Intent may be inferred from the nature of the act itself and the circumstances surrounding it. State v. Brown ---------- 393

22. Instructions must be considered as a whole in determining whether a particular instruction or a part thereof is prejudicial. State v. Brown ---------- 393

23. The clothing which a complaining witness was wearing at the time the crime was committed may be received in evidence if it has evidentiary value. State v. Brown ---------- 393

24. It is the better practice for a trial court to give a cautionary instruction on the testimony of an accomplice, but a failure to do so is not reversible error unless such an instruction was requested. State v. Brown ---------- 393
State v. Henry ---------- 432

25. A sentence which is within the limits authorized by statute will not be reduced in the absence of an abuse of discretion. State v. Brown ---------- 393

26. Where there is distinct evidence on each material fact necessary to establish the guilt of the accused, a verdict against him will be upheld, although such testimony may be contradicted by other witnesses. State v. Easter ---------- 412

27. A defendant may not predicate error on an instruc-

tion that is more favorable to him than is required by the law applicable to the charge made. State v. Easter ---------- 412

28. While it would not be improper to admonish the jury in the instructions to disregard any testimony ordered stricken during the course of the trial, it is not a necessary instruction. State v. Easter ---------- 412

29. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. Whether such other alleged crimes are too remote rests largely in the discretion of the trial court. State v. Easter ------ 412

30. Immunity against the use of illegally obtained evidence cannot be claimed by a defendant if he does not own or have a proprietary interest in the property which has been seized. State v. Easter ------ 412

31. Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion. State v. Easter ---------- 412

32. Guilty knowledge, which is an element of the crime of receiving stolen property, may be proved by circumstantial evidence. State v. Henry ---------- 432

33. Where the facts which were known to a defendent were such that a man of the age, intelligence, and experience of the defendant would know that the property was stolen, the jury can find that the defendant had guilty knowledge. State v. Henry -- 432

34. When the law requires the corroboration of a witness, the testimony of such witness must be supported by other evidence than that of the witness herself. State v. Witmer ---------- 449

35. It is only where there is in fact no preliminary examination upon a criminal charge, either in form or substance, that a plea in abatement may successfully be directed to the sufficiency of such hearing. State v. Burton ---------- 457

36. A bill of exceptions, preserving the evidence introduced on the hearing of issues of fact formed by a plea in abatement in a criminal case and the State's answer thereto, is a prerequisite to a review of the action of the trial court in overruling such plea. State v. Burton ---------- 457

37. Necessity and extent of corroboration of prosecuting

witness in a prosecution for debauching a minor stated. State v. Burton ---------- 457
38. When trial court is justified in directing a verdict for defendant in a criminal case stated. State v. Burton ---------- 457
39. Harmless error in a criminal prosecution is not a ground for the reversal of a conviction. State v. Burton ---------- 457
40. A trial court in a criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness leading questions. The discretion is a legal one and subject to proper limitations. State v. Burton ---------- 457
41. Error was not committed by trial court in permitting leading questions to be asked. State v. Burton ---------- 457
42. Prior ruling on effect of unlawful search and seizure modified to extent stated. State v. Goff ---- 548
43. "Fresh pursuit" is pursuit instituted immediately and with intent to reclaim or recapture, as where an animal has escaped, or a thief is fleeing with stolen goods. State v. Goff ---------- 548
44. A defendant in a criminal prosecution has a constitutional right to a public trial by an impartial jury. When it appears to the Supreme Court that a defendant has not been accorded a fair trial, its duty is to grant a new trial. State v. Goff -------- 548
45. It is not province of the Supreme Court to resolve conflicts in the evidence in criminal actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Marion -------- 698
46. It is the duty of the court, upon request of the accused, to instruct the jury upon his theory of the case if there is any evidence to support it. State v. May ---------- 717
47. It is prejudicially erroneous not to give a tendered instruction embodying a correct proposition of law if such proposition is applicable to the facts and material to the defense. State v. May ---------- 717
48. It is prejudicially erroneous to exclude impeaching testimony which would be of importance to the defense of an accused if a sufficient foundation is laid for impeachment. State v. May ---------- 717
49. An instruction in a criminal case, the effect of which is to infringe upon the right of a jury as the judge of the credibility of witnesses and the weight to be

given their testimony, is an invasion and an abridgment of a substantial right of the defendant. State v. May ---------- 717

50. If an accused is brought to trial within the statutory time after indictment or information, and such trial results in a mistrial from disagreement of the jury, accused cannot ignore the mistrial and claim a discharge on the ground that he was not tried within the time fixed by statute. State v. Fromkin ------ 849

51. Under statute, a mistrial because of disagreement of the jury should be without prejudice to the State's right to retry a defendant. State v. Fromkin ---- 849

52. The interpretation of the constitutional provision requiring a speedy trial is for the court, but the maximum time fixed by the Legislature is a reasonable one, and the Supreme Court adopts it as its own. State v. Fromkin ---------- 849

53. After the statutory requirements are satisfied as to the first trial, the time for retrial is within the sound discretion of the court; provided, that it may not extend beyond the statutory limits provided for the first trial. State v. Fromkin ---------- 849

54. In computing the terms required by the statute with relation to the time within which the defendant must be brought to trial, the term in which the information is filed is excluded. State v. Fromkin -------- 849

55. There was no abuse of discretion by the trial court considering all of the circumstances surrounding the determination of the time for the retrial of the defendant. State v. Fromkin ---------- 849

Damages.

1. A jury should be fully and fairly informed as to the various items of damage which it should take into consideration, together with the proper basis upon which each item is to be assessed. Zager v. Johnson ---------- 106

2. Damage for permanent injury may not be based upon speculation, probability, or uncertainty, but it must be shown by competent evidence that such damage is reasonably certain as a proximate result of the pleaded injury. Zager v. Johnson ---------- 106

3. If the court either on request or on its own motion attempts to define a method of arriving at present worth or value of future damages, and the instruction fails to contain a legal or comprehensive definition, it is prejudicially erroneous. Zager v. Johnson 106

4. When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict. Gross v. Johnson ---------- 273
5. Where it is pleaded and proved that two or more parties, even though recovery is sought against only one, were guilty of combined negligence which taken together proximately caused injuries to the plaintiff, the entire damage may be assessed by a jury against the one made a party. Hopwood v. Voss 304
6. In an action for damages for fraud, the measure of damages is the difference between the value of the the article or thing if it had been as represented and its actual value. Haarberg v. Schneider ------ 334
7. When a certain theory as to the measure of damages is relied upon by the parties in the trial court as the proper one, it will be adhered to on appeal whether correct or not. Haarberg v. Schneider ---------- 334
8. It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict, otherwise the jury may be confused and misled. Main v. Sorgenfrei -------- 523
9. In an action for damages it is the duty of the court to instruct the jury as to the proper measure of recovery. The tendering of a proper instruction is not a condition precedent to the assignment as error of an erroneous instruction on the measure of damages. Main v. Sorgenfrei ---------- 523
10. Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required since a remittitur would amount only to a substitution of the judgment of the court for that of the jury. Main v. Sorgenfrei -- 523
11. The measure of damage for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. State v. Dillon ---------- 560
12. The future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable cer-

tainty will be experienced by the injured person. Herndon v. Crawford ---------- 618
13. An instruction on the measure of damages permitting recovery for future pain and suffering when there is no competent evidence to support the same is prejudicial error. Herndon v. Crawford ---------- 618
14. Where the provisions of a fire insurance policy contemplate that in the event of fire loss the actual cash value of the property before the fire and the actual cash value after the fire shall be compared, the measure of damage is the difference between the two, subject however to limitations, if any, expressed by the terms of the policy. Grantham v. Farmers Mutual Ins. Co. ---------- 790
15. A limitation contained in an insurance policy wherein the basic measure of damage is value before and after a fire is not a substantive measure of damage. Grantham v. Farmers Mutual Ins. Co. ---------- 790

Deeds.

The true test in determining whether a conveyance absolute in form should be treated as a mortgage is whether the relation of the parties to each other as debtor and creditor continues. If it does so continue, the transaction will be treated as a mortgage and the conveyance as security only, otherwise not. Arla Cattle Co. v. Knight ---------- 360

Descent and Distribution.

1. The right of a husband or wife to bar his or her right of inheritance by a contract made in lieu thereof before marriage is statutory in this state. Dorshorst v. Dorshorst ---------- 886
2. The right to make an antenuptial contract being statutory and in derogation of the common law, the manner prescribed by statute for exercising the right is a condition upon which the right exists. Dorshorst v. Dorshorst ---------- 886
3. When an antenuptial contract is not acknowledged as required by statute, it is void for failure to comply with a statutory condition that is essential to the existence of the right to make such a contract. Dorshorst v. Dorshorst ---------- 886

Divorce.

1. A divorce decree is ordinarily considered a final ad-

judication of the property rights of the parties, and may not be modified after 6 months from its rendition except when it lacks the attributes of a final judgment, where reservations are contained in it which lay the foundation for a modification, or where changed circumstances can be shown. Card v. Card 124

2. Provisions in a divorce decree that a gross award of alimony shall be paid in installments and that liability for such installments shall cease on the death or remarriage of the wife are not void as being against public policy. Card v. Card ---------- 124

3. An allegation that the termination of installments on a gross award of alimony are oppressive, unconscionable, and inequitable does not state a cause of action in a collateral attack upon a final judgment. Card v. Card ---------- 124

4. A party to a divorce action will not ordinarily be required to pay attorney's fees for the benefit of the wife's legal counsel in a case involving the wife's collateral and unjustified attack upon a decree of divorce which has become final. Card v. Card ---------- 124

5. In the absence of evidence showing a change in circumstances, there is no basis upon which the judgment in a divorce action which has become final can or should be modified. Coker v. Coker ---------- 218

6. Rule for determination of alimony and property settlement in a divorce action stated. Roach v. Roach 266

7. Elements to be considered in determining amount of alimony in divorce case stated. Roach v. Roach -- 266

8. Rule for trial de novo of divorce action stated. Harding v. Harding ---------- 371

9. An application for the modification of a divorce decree with respect to the custody of minor children, made any time after the granting of the divorce, must be founded upon facts and circumstances which have arisen subsequent to the granting of the divorce. Harding v. Harding ---------- 371

10. Acts asserted as grounds for divorce must be corroborated. Chipman v. Chipman ---------- 584

11. Statutory rule requiring corroboration in a divorce action applies alike in default and contested cases. Chipman v. Chipman ---------- 584

12. Any unjustifiable conduct by either the husband or the wife which destroys the legitimate ends and objects of matrimony constitutes extreme cruelty. Chipman v. Chipman ---------- 584

13. In an action for divorce, even where there is no ap-

pearance by the defendant, the trial judge must be satisfied that the case is prosecuted in good faith and without collusion, and that a cause of action exists. He is not bound to accept as conclusive, in all cases, the testimony of the plaintiff, although corroborated in some minor details. Chipman v. Chipman ---------- 584

14. What constitutes extreme cruelty in divorce case stated. Ross v. Ross ---------- 795
15. Corroboration of the acts of extreme cruelty testified to by a plaintiff in a divorce action is a basic essential for the right to a decree of divorce. The degree of corroboration required must be determined on the facts and circumstances of each particular case. Ross v. Ross ---------- 795
16. Corroboration relied upon in a suit for divorce must be competent evidence of the acts and conduct asserted as a ground for divorce. Ross v. Ross ---------- 795
17. Ordinarily, condonation is complete if there is a resumption of marital relations after the alleged breach of marital duty. Ross v. Ross ---------- 795
18. Rule for determination of custody of children in divorce case stated. Ross v. Ross ---------- 795

Dower.

Antenuptial contracts were void at common law, and did not constitute a bar to dower. Dorshorst v. Dorshorst ---------- 886

Elections.

1. Where there is no territorial restriction upon the authority of the officer who administered the oath to an absentee voter, the failure of the certificate of the officer to state the place of the execution of the oath and certificate does not invalidate the ballot. State ex rel. Brogan v. Boehner ---------- 689
2. Where the certificate of the officer who administered the oath to an absentee voter, together with other information appearing on the identification envelope, fairly indicates that the officer who administered the oath and executed the certificate was authorized to do so, the ballot is valid. State ex rel. Brogan v. Boehner ---------- 689
3. A party who wishes to dispute an election upon the basis that illegal votes were cast has the burden of proving for which candidate the illegal votes were cast. State ex rel. Brogan v. Boehner ---------- 689

4. Where the record does not clearly show what the result of an election should be, the court will not substitute its judgment for that of the electorate as declared by the proper authorities. State ex rel. Brogan v. Boehner ---------- 689

Electricity.

1. By virtue of the language contained in statute respecting electric transmission lines, and the history of the provision, the right to obtain service from persons, associations, or corporations, operating electric transmission lines outside the limits of incorporated cities or villages, extends to all persons, associations, and corporations residing within the statutorily described territory. State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. ---- 350
2. The origin of the history which makes this so is contained in the declaration of intent contained in the title to the original act, which declaration has not been changed by later legislative action or judicial determination. State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. ---------- 350
3. The 1961 legislative act establishing a public power commission did not destroy or impair the obligation imposed and rights declared under prior legislative act. State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. ---------- 350
4. All of the obligations imposed and rights declared by statute requiring service by electric corporations was preserved in legislation creating public power districts. State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. ---------- 350

Eminent Domain.

1. Property may be appropriated by a public corporation for the discharge from its sewage plant, but it is liable for any damage caused thereby. McCubbin v. Village of Gretna ---------- 139
2. In order to satisfy statutory requirement of attempt to agree with the owner prior to the institution of condemnation proceedings, there must be a good faith attempt to agree, consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it. State v. Mahloch ---------- 190
3. The general rule in condemnation cases is that the burden of showing the damages which the landowner or lessee will suffer rests upon him while the bur-

den is on the condemner to show matters which tend to reduce or mitigate damages. State v. Mahloch -- 190
4. The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the reasonable market value of the land at the time the land is taken or damaged. State v. Mahloch ---- 190
5. Whether evidence of an offer to sell is too remote in time to be admissible is for the trial court to determine in the exercise of a sound discretion. State v. Mahloch ---------- 190
6. If plaintiffs' property has been damaged for public use, they are entitled to compensation. Gentry v. State ---------- 515
7. In a condemnation action witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. O'Neill v. State ---------- 540
8. In a condemnation action the condition of the property, its surroundings, and its availability for any particular use may be shown, and if it has any peculiar adaptation which adds to its value the owner is entitled to the benefit thereof. O'Neill v. State -- 540
9. Evidence of the price at which other lands have been sold is admissible in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of land condemned. O'Neill v. State ---------- 540
10. In a condemnation action when the evidence is conflicting, the verdict of the jury will not be set aside, unless it is shown to be clearly wrong. O'Neill v. State ---------- 540
11. The measure of damage for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. State v. Dillon ---------- 560

Equity.

1. A court of equity should, upon proper application, be sure that the rights of all persons before it are protected and that they be given the right to appeal from an adverse judgment. State ex rel. City of Grand Island v. Tillman ---------- 23

2. Circumstances under which a court of equity will raise a constructive trust stated. Light v. Ash ---- 44
3. With respect to fraud, the same rigid rules do not apply in a court of equity as apply in a court of law. Rules in equity stated. Workman v. Workman ---- 471
4. A court of equity will not permit mere corporate forms to serve as a cloak and a shield for the perpetration of a fraud, but will examine the whole transaction, looking through corporate forms to the substance of things to protect the rights of innocent parties. Workman v. Workman ---------- 471
5. Courts of equity should be extremely reluctant to effect forfeitures. Willan v. Farrar ---------- 826

Estoppel.

The doctrine of estoppel is applicable to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit. Wenzel v. Wenzel 61

Evidence.

1. The Supreme Court will not take judicial notice of the rules of practice of the district court. Nile Valley Fed. Sav. & Loan Assn. v. Schank ---------- 35
2. Parol testimony is not admissible where it is offered for the purpose of proving by parol some other agreement as to the contractual terms and the method of payment other than that specified in the writing. Hansen v. Commonwealth Co. ---------- 70
3. Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded. State v. Wilson ---------- 86
4. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. Erving v. State ---------- 90
State v. Easter ---------- 412
5. In crimes involving motive, criminal intent, or guilty knowledge, evidence of independent crimes wholly disconnected with the one charged may be received. Erving v. State ---------- 90
6. In a criminal case, the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written copies of statements and other documentary evidence for the inspection of defendant's counsel before trial.

Error may be predicated only for an abuse of discretion. Erving v. State ---------- 90
7. Tables of life expectancy may be properly received in evidence only when there is competent evidence that the claimed injuries are permanent. Zager v. Johnson ---------- 106
8. Affidavits used as evidence on the hearing or trial of any issue of fact must have been, as a prerequisite to examination of them in the Supreme Court, identified and offered in evidence in the trial court and embodied in a bill of exceptions. State v. Kent 115
Arla Cattle Co. v. Knight ---------- 360
9. Under the doctrine announced and held in this state, no presumption of guilt arises from the mere possession of stolen property; the inference to be drawn from such fact is alone for the jury when weighed in connection with all the evidence adduced on the trial. State v. Kent ---------- 115
10. Whether evidence of an offer to sell is too remote in time to be admissible is for the trial court to determine in the exercise of a sound discretion. State v. Mahloch ---------- 190
11. When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof of the facts sought to be put in evidence by the question in order to present the ruling to the Supreme Court for review. Cook v. Ketchmark ---------- 222
12. The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be put in evidence. State ex rel. Meyer v. Sorrell ---------- 340
13. A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered. State v. Brown ---------- 387
State v. Henry ---------- 432
14. Prior inconsistent and contradictory statements of a defendant which were voluntary are admissible for the purpose of impeachment. State v. Brown ---- 387
15. The clothing which a complaining witness was wearing at the time the crime was committed may be received in evidence if it has evidentiary value. State v. Brown ---------- 393
16. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. Whether such other

alleged crimes are too remote rests largely in the discretion of the trial court. State v. Easter ------ 412
17. When the law requires the corroboration of a witness, the testimony of such witness must be supported by other evidence than that of the witness herself. State v. Witmer ---------- 449
18. Rule as to consideration and effect of physical facts as evidence stated. Main v. Sorgenfrei ---------- 523
19. Where there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury. Main v. Sorgenfrei -- 523
20. It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses. Main v. Sorgenfrei -- 523
21. In a condemnation action witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. O'Neill v. State ---------- 540
22. In a condemnation action the condition of the property, its surroundings, and its availability for any particular use may be shown, and if it has any particular adaptation which adds to its value the owner is entitled to the benefit thereof. O'Neill v. State ---------- 540
23. Evidence of the price at which other lands have been sold is admissible in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of land condemned. O'Neill v. State ---------- 540
24. In an action for damages by reason of alleged negligence of another, evidence as to the financial standing of the parties is inadmissible. Singles v. Union P. R.R. Co. ---------- 816
25. Where the defendant in a personal injury case makes no attempt to show the plaintiff is receiving a pension, it is not proper for the plaintiff to offer testimony showing he received a small and inadequate one. Singles v. Union P. R.R. Co. ---------- 816

Executors and Administrators.

1. An administrator who pays out money in pursuance of an order made by the county court cannot be personally charged with the reimbursement of the same in the absence of evidence showing that the

order was obtained by fraud and that he had guilty knowledge of the same. Anderson v. Lamme ------ 398

2. A secured creditor may rely upon his security and is not required to file a claim in the estate proceedings. Anderson v. Lamme ---------- 398

3. The personal representative of an estate is a fiduciary in his relation to the beneficiaries of the estate of the deceased. As such he is required to make a full disclosure of all facts within his knowledge which are material for the beneficiaries of the estate to know to protect their interest. Anderson v. Lamme ---------- 398

4. Before the administrator of an estate can be held liable to the heirs of a deceased for a violation of the fiduciary relationship, the heirs must show that they were damaged as a result of that fact. Anderson v. Lamme ---------- 398

5. Where the administrator of an estate is a lawyer and performs legal services which are necessary and beneficial to the estate, such services are extraordinary within the meaning of statute allowing compensation to an administrator, and the court may make an allowance as reasonable compensation for such services. Anderson v. Lamme ---------- 398

6. The continuance of the operation of the business of a decedent is not a service required of the administrator of an estate in the common course of his duty. It is in the nature of an extraordinary service within the meaning of statute allowing compensation to an administrator, and the court may make an allowance as reasonable compensation for such services. Anderson v. Lamme ---------- 398

7. The compensation allowed an administrator for his services in the continuance of the operation of the business of a decedent should be the reasonable value of the time and effort expended. Anderson v. Lamme ---------- 398

Fraud.

1. The existence of an intent to defraud at the time the promise was made may be inferred from the failure to comply with the promise. The promisor may be presumed to have intended, when he made the promise, to do what he finally did do with respect thereto. Light v. Ash ---------- 44

2. In order to avoid a judgment on the ground of

fraud in obtaining it, the facts constituting the fraud must be pleaded and proved. Card v. Card ---- 124
3. Essentials required to plead and prove an action for rescission because of fraud stated. Anson v. Grace ---- 258
4. In an action for damages for fraud, the measure of damages is the difference between the value of the article or thing if it had been as represented and its actual value. Haarberg v. Schneider ---- 334
5. With respect to fraud, the same rigid rules do not apply in a court of equity as apply in a court of law. Rules in equity stated. Workman v. Workman ---- 471
6. To prove fraud direct evidence is not always essential. Inferences or presumptions of fraud may be drawn from facts and circumstances. However, such inferences or presumptions must not be guess work or conjecture but must be rational and logical deductions from the facts and circumstances from which they are inferred. Workman v. Workman ---- 471
7. What constitutes fraud is a matter of fact in each case. Courts content themselves with determining from the facts in each case whether fraud does or does not exist. Workman v. Workman ---- 471
8. The existence of a confidential or fiduciary relation does not shift the burden of proof in an action for fraud, but may have the effect of placing the burden of proof of going forward with the evidence upon the party charged with fraud. Workman v. Workman ---- 471
9. One who has been induced by fraud to enter into a contract may affirm the contract and maintain an action to recover the damages he has sustained or may set up such damages by way of defense or counterclaim. Midwest Laundry Equipment Corp. v. Berg ---- 747

Frauds, Statute of.

Trusts arising by implication, or by operation of law, are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception. Light v. Ash ---- 44

Guaranty.

1. Where a guarantor pays his principal's debt, the guarantor has a right of action against his principal for reimbursement. O. K. Door Co., Inc. v. Lincoln Eng. Constr. Co. ---- 682

2. An express agreement declaring the rights of the parties flowing from a breach of a contract of guaranty prevails over the implied right of the guarantor to reimbursement. O. K. Door Co., Inc. v. Lincoln Eng. Constr. Co. ---------- 682

Highways.

1. A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it. Gross v. Johnson ---------- 273
2. A user of highways may assume that other users thereof will use them in a lawful manner and govern his acts in accordance with such assumption unless or until he has warning, notice, or knowledge to the contrary. Gross v. Johnson ---------- 273
3. Duty of motorist approaching a highway protected by stop signs stated. Gross v. Johnson ---------- 273
4. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view. Gross v. Johnson ---------- 273
5. The word "highway," insofar as the rules of the road are concerned, applies to streets as well as highways. Gross v. Johnson ---------- 273
6. An arterial highway is not deprived of its character or status because a stop sign on an intersecting road is temporarily displaced or otherwise rendered invisible. Gross v. Johnson ---------- 273
7. The violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law but is evidence of negligence to be considered by the jury in connection with other circumstances in evidence. Hermansen v. Anderson Equipment Co. 325
8. Statute regulating, restricting, or prohibiting ingress and egress to a state highway upon which the Department of Roads has established a limited or controlled access facility is not special legislation within the purview of Article III, section 18, of the Constitution. Fougeron v. County of Seward ---------- 753
9. Statute limiting ingress and egress to a state highway is independent of and is not to be considered in connection with the general road laws. Fougeron v. County of Seward ---------- 753
10. Statute limiting ingress and egress to a state highway is not violative of the due process clause of the Constitution, in failing to provide notice to land-

owners who suffer no compensable damages by the barricading of a county road. Fougeron v. County of Seward ---------- 753

11. An owner or a person claiming an interest in property is not entitled to recover damages for the barricade of a county road unless he has sustained an injury different in kind, and not merely in degree, from that suffered by the public at large. Fougeron v. County of Seward ---------- 753
12. The fact that a property owner may have to travel a circuitous and longer route to reach certain points because of a barricade of a county road does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages. Fougeron v. County of Seward ---------- 753
13. Where the Department of Roads sends a timely notice by certified mail to the county board of the county in which a barricade of a county road is contemplated, and such notice is received and receipted for by an employee of the county clerk's office in the regular course of handling, the service of the notice is complete and in compliance with the statute. Fougeron v. County of Seward ---------- 753

Homicide.

1. A purpose to kill and malice are material elements of murder in the second degree, and, under a charge therefor, the burden is on the State to prove both beyond a reasonable doubt. State v. Marion ------ 698
2. Where the evidence and circumstances of a crime are such that different conclusions may properly be drawn therefrom as to the degree of homicide, the question of degree is for the determination of the jury. State v. Marion ---------- 698
3. In a prosecution for homicide the unlawful killing is the principal fact to be determined, but the condition of the mind of the accused and the attendant circumstances determine the degree of the crime. State v. Marion ---------- 698
4. Rule as to when there is a presumption of legal malice in a homicide case stated. State v. Marion -- 698

Husband and Wife.

Prior opinion, that in an action by a nonresident married women against a representative of a deceased person to recover title to lands in this state,

her husband is a competent witness to testify to conversations with such deceased person, is overruled. Light v. Ash ---------- 627

Incest.

1. In a prosecution for the crime of incest, the testimony of the prosecutrix must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction. State v. Witmer ---------- 449
2. The unsupported testimony of a prosecutrix in an incest case, that frequent acts of sexual intercourse with defendant occurred prior to the commission of the act informed against, is not corroborative of her testimony as to the commission of the offense charged. State v. Witmer ---------- 449
3. Where a previous act of sexual intercourse is relied upon as the sole corroboration of the prosecutrix in a prosecution for incest, the evidence of prosecutrix as to such previous act must be corroborated. State v. Witmer ---------- 449

Indictments and Informations.

1. A mere misnomer of the offense is not fatal to the validity of the complaint or information. State v. Crowley ---------- 291
2. An information must inform the accused with reasonable certainty of the charge against him so that he may prepare his defense and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense. State v. Crowley ---------- 291
3. Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute. State v. Crowley ---------- 291

Infants.

1. The guardian ad litem of an infant litigant is entitled to an allowance of reasonable compensation for his services to be taxed as costs. Omey v. Stauffer ---- 247
2. A defendant is not entitled to a jury trial upon a complaint filed in the juvenile court alleging that the defendant is a delinquent child. State ex rel. Weiner v. Hans ---------- 612
3. A proceeding under the Juvenile Court Act is a special statutory proceeding and the review in the

Supreme Court of such a proceeding is by trial de novo. State ex rel. Weiner v. Hans ---------- 612

Injunctions.

1. Courts will consider, among other things, whether an injunction would not destroy the sewer system of a city, and subject the public to serious inconvenience and danger. McCubbin v. Village of Gretna -------- 139
2. The disobedience of an injunction must be willful before the breach thereof may be punished as a contempt. Kasparek v. May ---------- 732
3. A private person who seeks to restrain an act of a municipal body, in order to state a cause of action, must plead some special injury peculiar to himself aside from and independent of a general injury to the public unless it entails an illegal expenditure of public funds or involves an illegal increase in the burden of municipal taxation. Holland v. Brownville Grain Co. ---------- 742

Insurance.

1. The liability of an insurer to pay in excess of the limits of the insurance policy accrues when the insurer, having the exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within policy limits. Olson v. Union Fire Ins. Co. ---------- 375
2. When an insurer has the exclusive right to settle a claim within the limits of its liability, it has an option to compromise but no contractual obligation to do so. Olson v. Union Fire Ins. Co. ---------- 375
3. The amount of liability fixed by an insurance policy and upon which the premium is paid determines the limit of the contractual liability and duty of the insurer. Olson v. Union Fire Ins. Co. ---------- 375
4. An insurer may settle a claim within the limit of its liability as it chooses since the insured cannot be prejudiced by a settlement to be paid by the insurer. Olson v. Union Fire Ins. Co. ---------- 375
5. An insurance company is not required to waive its defense of nonliability which is made in good faith to avoid being held for a judgment in excess of the limits of its insurance policy. Olson v. Union Fire Ins. Co. ---------- 375
6. An insurance company cannot be held for the payment of a liability in excess of policy limits merely

because its determination, arrived at in good faith, proved to be erroneous in the light of subsequent events. Olson v. Union Fire Ins. Co. ---------- 375

7. The right of an insurer to control the litigation in all of its aspects carries with it the duty to exercise diligence, intelligence, good faith, and conscientious fidelity in the interests of the parties. Olson v. Union Fire Ins. Co. ---------- 375

8. Rule for determination of liability of insurance company for declining to accept an offer of settlement stated. Olson v. Union Fire Ins. Co. ---------- 375

9. Where the allegations of a petition, to which a policy of insurance is attached, show that an advance deposit on an insurance policy was paid by the agent upon the promise of the insured to pay it, and that the amount is due and unpaid, the petition states a cause of action. R. B. Jones & Sons, Inc. v. Nelson ---------- 655

10. Where the provisions of a fire insurance policy contemplate that in the event of fire loss the actual cash value of the property before the fire and the actual cash value after the fire shall be compared, the measure of damage is the difference between the two, subject however to limitations, if any, expressed by the terms of the policy. Grantham v. Farmers Mutual Ins. Co. ---------- 790

11. A limitation contained in an insurance policy wherein the basic measure of damage is value before and after a fire is not a substantive measure of damage. Grantham v. Farmers Mutual Ins. Co. ---------- 790

Interest.

Where money or property belonging to another was not paid or turned over to the person entitled to receive it at the time when it should have been paid or turned over, interest is generally allowed. Workman v. Workman ---------- 471

Intoxicating Liquors.

A person is under the influence of alcoholic liquor if he has lost to an appreciable degree the normal control of his body or mental faculties. State v. May ------ 717

Judgments.

1. Res judicata is ordinarily an affirmative defense. It is only when it affirmatively appears to exist from

the petition itself that it affords a basis for sustaining a general demurrer. Card v. Card 124
2. In order to avoid a judgment on the grounds of fraud in obtaining it, the facts constituting the fraud must be pleaded and proved. Card v. Card 124
3. A declaratory judgment action will not be entertained if there is pending, at the time of its initiation, another action or proceeding in which the same parties are involved and in which the same issues may be adjudicated. State ex rel. Meyer v. Sorrell 340
4. Party defendant may move for summary judgment prior to service of responsive pleading. Arla Cattle Co. v. Knight 360
5. In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law. Arla Cattle Co. v. Knight 360
6. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. Arla Cattle Co. v. Knight .. 360
7. The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial. Arla Cattle Co. v. Knight 360
Ransdell v. Sixth Street Food Store 875
8. After the final adjournment of the term of court at which a judgment has been rendered, the district court has no authority or power to modify the judgment except for the reasons stated and within the time limited by statute for vacation of judgment after the term. Pep Sinton, Inc. v. Thomas 508
9. Where a county court having jurisdiction of the subject matter determines from evidence that the venue of the action has been established and enters its judgment to that effect, such judgment, if no appeal is taken therefrom, is a final adjudication of the issue. Lewin v. Lewin 596
10. Where the evidence shows that a person is sued in his personal capacity on an obligation alleged to have been contracted by him, any judgment rendered must run against him personally. R. B. Jones & Sons, Inc. v. Nelson 655
11. The burden is upon the party moving for a summary judgment to show that no issue of fact exists and

unless he can conclusively do so, the motion must be overruled. Ransdell v. Sixth Street Food Store .. 875
12. In considering a motion for summary judgment, the court should view the evidence in the light most favorable to the party against whom it is directed. Ransdell v. Sixth Street Food Store ---------- 875

Juries.

1. It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses. Cullinane v. Milder Oil Co. ---------- 162
2. The fact that a jury may have deliberated for a relatively short time before reaching its verdict does not establish that it acted with passion and prejudice or ignored the instructions of the court. State v. Brown ---------- 287
3. A defendant is not entitled to a jury trial upon a complaint filed in the juvenile court alleging that the defendant is a deliquent child. State ex rel. Weiner v. Hans ---------- 612
4. In jury cases, jurors are the judges of credibility of witnesses and the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. State v. May ---------- 717

Landlord and Tenant.

1. In the absence of an express covenant or stipulation, a lessor is not bound to make repairs to leased property. Sky Harbor Air Service v. Airport Authority ---------- 243
2. A lease is a contract for the possession and profits of land and tenements for a certain period of time. The essential elements of a contract must be present. Johnson v. City of Lincoln ---------- 837
3. Whether an instrument is a lease or creates a relation other than that of lessor and lessee depends on the intention of the parties. The instrument is to be reasonably construed, and the practical construction given it by the parties thereto considered. Johnson v. City of Lincoln ---------- 837
4. An instrument may be given effect as a lease although the word "lease" is not used. Johnson v. City of Lincoln ---------- 837

5. The validity of a lease of real estate, and the bona fides of the relation of landlord and tenant created thereby, are in no manner affected by the provisions thereof merely determining that the amount of the rental shall be fixed at a definite percentage of the amount of income received by the tenant. Johnson v. City of Lincoln ---------- 837
6. A lease should contain a sufficiently accurate description of the property demised as clearly to indicate just what property is intended to be covered by the lease. No particular form of description is necessary. Any description by which the identity of the leased property may be established is sufficient. Johnson v. City of Lincoln ---------- 837
7. In litigation over a lease where the parties concerned are fully acquainted with the premises, any uncertainty in description is cured by the introduction of record evidence describing the land. Johnson v. City of Lincoln ---------- 837
8. A tenant for a term has a property right in land, which is protected by Article I, section 21, of the Constitution of Nebraska. Johnson v. City of Lincoln 837

Larceny.

1. Under the doctrine announced and held in this state, no presumption of guilt arises from the mere possession of stolen property; the inference to be drawn from such fact is alone for the jury when weighed in connection with all the evidence adduced on the trial. State v. Kent ---------- 115
2. The force and effect to be given the fact of possession of stolen property recently after the theft, and the sufficiency or insufficiency of such evidence, are solely for the jury. It is improper for the court to instruct the jury as to the effect to be given, or the sufficiency of, the evidence, in whole or in part. State v. Kent ---------- 115

Limitations of Actions.

1. A cause of action for malpractice based upon the alleged failure of a physician to remove a foreign object left in the body of a patient by mistake does not accrue until the patient discovers, or in the exercise of reasonable diligence should have discovered, the presence of the foreign object. Spath v. Morrow ---------- 38
2. By statute, the plaintiff is required to give notice

in writing as soon as practical after the accident, make a claim for compensation within 6 months, and commence action within 1 year. Seymour v. Journal-Star Printing Co. ---------- 150
3. In case of latent injury, the time for commencement of action is extended to 1 year after the employee obtained knowledge that the accident caused compensable disability. Seymour v. Journal-Star Printing Co. ---------- 150
4. The limitation of the statute relates to the time when compensable disability became known, and not when the full extent of the disability was ascertained. Seymour v. Journal-Star Printing Co. ---- 150
5. The 1-year statute of limitations applicable to actions for libel and slander is equally applicable to actions for slander of title. Gentry v. State ---------- 515
6. A private tax sale certificate on which action has been properly commenced within 5 years will not become void by reason of the period of time which thereafter transpires during the pendency of the action. Fairley v. Kemper ---------- 565
7. Where the record shows that an action was not commenced within the time required by statute, the petition is subject to demurrer. Gorgen v. County of Nemaha ---------- 588

Mandamus.

Mandamus is the proper procedure to compel a public service corporation to furnish service. State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. 350

Marriage.

1. Antenuptial contracts were void at common law, and did not constitute a bar to dower. Dorshorst v. Dorshorst ---------- 886
2. The right of a husband or wife to bar his or her right of inheritance by a contract made in lieu thereof before marriage is statutory in this state. Dorshorst v. Dorshorst ---------- 886
3. The right to make an antenuptial contract being statutory and in derogation of the common law, the manner prescribed by statute for exercising the right is a condition upon which the right exists. Dorshorst v. Dorshorst ---------- 886
4. When an antenuptial contract is not acknowledged as required by statute, it is void for failure to comply with a statutory condition that is essential

to the existence of the right to make such a contract. Dorshorst v. Dorshorst ---------- 886

Master and Servant.

The word "employment" as used in the Liquor Control Act refers to a status and relationship and not to the nature of the benefit received. State ex rel. Meyer v. Sorrell ---------- 340

Mines and Minerals.

1. An oil and gas lease, providing that, unless work is commenced by a certain time, or unless the lessee pay a rental stated to renew the lease, it shall terminate, confers an optional right upon the lessee and should be strictly construed in favor of the lessor and against the lessee. Willan v. Farrar ---------- 826
2. Such a delay rental clause is a special limitation, time is of the essence of the contract, and failure of the lessee or his assigns to tender or pay rentals within the specified time automatically terminates the lease without any affirmative action by the lessor, or anyone else, for that purpose. Willan v. Farrar ---------- 826
3. Where the lessor of an "unless" oil and gas lease accepts delay rentals after the time specified for payment in the lease or retains the payment for an unreasonable time before returning it, he thereby waives strict performance and is estopped to claim termination of the lease. Willan v. Farrar -------- 826
4. Where a personal check has been accepted by a lessor, the lessor is obligated to present the check for payment and cannot declare the lease terminated unless payment is refused. Willan v. Farrar ------ 826

Money Lenders.

The design of the Installment Loan Act is to license and control the business of making installment loans and to restrict the enforcement or collection of illegal loans once they have been made. Hansen v. Commonwealth Co. ---------- 70

Mortgages.

The true test in determining whether a conveyance absolute in form should be treated as a mortgage is whether the relation of the parties to each other as debtor and creditor continues. If it does so

continue, the transaction will be treated as a mortgage and the conveyance as security only, otherwise not. Arla Cattle Co. v. Knight ---------- 360

Motor Carriers.

1. The purpose of the Nebraska Motor Carrier Act is the regulation of motor carrier transportation in the public interest. Its purpose is not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Black Hills Stage Lines, Inc. v. Greyhound Corp. -- 425
2. Controlling questions in determining the issue of public convenience and necessity stated. Black Hills Stage Lines, Inc. v. Greyhound Corp. -------- 425
3. Where there is evidence to sustain the factors advanced by the parties which are required to be considered by the railway commission under the Motor Carrier Act, the determination of the public interest is for the commission and not for the courts. Black Hills Stage Lines, Inc. v. Greyhound Corp. -------- 425
4. Where there is evidence to sustain a finding of the railway commission that the benefit which would be denied the general public outweighs the detriment accruing to existing carriers, it cannot be said that the granting of a new certificate is unreasonable or arbitrary. Black Hills Stage Lines, Inc. v. Greyhound Corp. ---------- 425
5. In considering an application for a permit to operate as a contract carrier the burden is upon the applicant to show that the proposed service is specialized and fits the need of the proposed contracting shippers. Hagen Truck Lines, Inc. v. Ross ---------- 646
   Midwest Mail Service, Inc. v. Bankers Dispatch Corp. 809
6. Protesting common carriers may then show that they are fit, willing, and able to meet the special need. Hagen Truck Lines, Inc. v. Ross ---------- 646
7. If competent proof is made by the applicant showing the proposed service to be specialized and needed, and by protesting common carriers showing a willingness and ability to perform it, the applicant must then establish that he is better equipped and qualified to meet the special needs of the proposed contracting shippers than the protesting common carriers. Hagen Truck Lines, Inc. v. Ross ---------- 646
8. Proposed contracting shippers desiring a specialized service are entitled to service in accordance with

their needs. Where the evidence is in conflict as between an applicant for a contract-carrier permit and objecting common carriers, it is the province of the railway commission to resolve the issue. Hagen Truck Lines, Inc. v. Ross ---------- 646

9. The adequacy of existing services to perform the normal needs of proposed contracting shippers is not conclusive where the new service is better designed to fit the special requirements of the proposed contracting shippers. Hagen Truck Lines, Inc. v. Ross 646

10. The purpose of the Motor Carrier Act is not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair and destructive competitive practices. Hagen Truck Lines, Inc. v. Ross ------ 646

11. Definition given and application made of term "consistent with the public interest" in Motor Carrier Act. Hagen Truck Lines, Inc. v. Ross ---------- 646

12. The term "common carrier" means any person who or which undertakes to transport passengers or property for the general public in intrastate commerce by motor vehicle for hire, whether over regular or irregular routes, upon the highways of this state. Francis R. Orshek Co. v. State ---------- 668

13. Where the evidence shows that the purpose of the applicant is to transport designated commodities for the general public, even though the service offered is limited or specialized, it tends to support factors indicative of a common carrier and not that of a contract carrier. Midwest Mail Service, Inc. v. Bankers Dispatch Corp. ---------- 809

14. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established. Midwest Mail Service, Inc. v. Bankers Dispatch Corp. ---------- 809

15. The grant of a permit to a contract carrier to render specialized service for proposed shippers may rest on a future need as well as an existing one, but such future need must be shown by evidence that is reasonably certain. It may not rest solely on speculation and conjecture. Midwest Mail Service, Inc. v. Bankers Dispatch Corp. ---------- 809

Municipal Corporations.

1. The power conferred upon municipal corporations to enact ordinances on specified subjects is to be con-

strued strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects. State ex rel. City of Grand Island v. Tillman ---------- 23
2. Power of a municipal corporation to extend its boundaries stated. State ex rel. City of Grand Island v. Tillman ---------- 23
3. By the terms of statute the maximum speed limit of a motor vehicle permitted at the intersection involved in this action was 25 miles an hour. Zager v. Johnson ---------- 106
4. By the terms of statute in force at the time of the accident involved here, where two motor vehicles approached an intersection at approximately the same time and within the maximum limit of speed provided, the driver of the one to the left was required to yield the right-of-way to the one to the right. Zager v. Johnson ---------- 106
5. By the terms of statute a driver of an automobile having the right-of-way at an intersection forfeits such right-of-way if he is driving in excess of the speed limit provided. Zager v. Johnson ---------- 106
6. Courts will consider, among other things, whether an injunction would not destroy the sewer system of a city, and subject the public to serious inconvenience and danger. McCubbin v. Village of Gretna 139
7. Property may be appropriated by a public corporation for the discharge from its sewage plant, but it is liable for any damage caused thereby. McCubbin v. Village of Gretna ---------- 139
8. Courts should give to language in city ordinances its plain and ordinary meaning. Shamberg v. City of Lincoln ---------- 146
9. A municipal ordinance which decreases the speed limit from that otherwise prescribed by statute is effective only when appropriate signs giving notice thereof have been erected. Omey v. Stauffer ------ 247
10. Courts will not review or inquire into the legislative acts of municipal boards concerning matters within their power, as to whether they acted expediently, wisely, or necessarily. Such are matters of purely legislative function, and not of judicial concern. Jones v. Village of Farnam ---------- 704
11. A private person who seeks to restrain an act of a municipal body, in order to state a cause of action, must plead some special injury peculiar to himself aside from and independent of a general injury

to the public unless it entails an illegal expenditure of public funds or involves an illegal increase in the burden of municipal taxation. Holland v. Brownville Grain Co. ---------- 742

12. While a city of the metropolitan class has the power to zone, such zoning must, however, not be unreasonable, discriminatory, or arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance. Bucholz v. City of Omaha ---------- 862
13. The validity of a zoning ordinance must be determined by an examination of the facts presented in the particular case. Whether a zoning ordinance is arbitrary and unreasonable, or illegal, must be determined by the evidence of the special surrounding conditions and circumstances. Bucholz v. City of Omaha ---------- 862
14. The burden is on one who attacks the validity of a zoning ordinance, valid on its face and enacted under lawful authority, to prove facts which establish its invalidity. Bucholz v. City of Omaha ---------- 862
15. The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary. Bucholz v. City of Omaha ---------- 862
16. What is the public good is primarily a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed; and unless an abuse of discretion has been clearly shown, it is not the province of the court to interfere. Bucholz v. City of Omaha ---------- 862
17. A city has no right or power to enter into contracts which curtail or prohibit an exercise of its legislative or administrative authority. Bucholz v. City of Omaha ---------- 862
18. Ordinances rezoning certain property to permit the construction of a regional shopping center are not invalid because of the exaction of a protective covenant required by the city. Bucholz v. City of Omaha 862

Municipal Courts.

1. The plaintiff appealing to the district court from a judgment rendered in municipal court in favor of the defendant therein must file his petition on appeal within 50 days from the date of the rendition of judgment in the municipal court unless the district court for good cause shown shall otherwise order.

Pep Sinton, Inc. v. Thomas ---------- 508
2. If the plaintiff on appeal fails to file his petition within the prescribed time and the district court by order overrules his motion to file the same out of time, it is the duty of the district court on motion of the defendant to enter judgment against the plaintiff, unless the order is vacated or modified. Pep Sinton, Inc. v. Thomas ---------- 508
3. An order of the district court overruling a motion of the plaintiff to file a petition on appeal from the municipal court after the expiration of 50 days from the judgment rendered therein is a final order. Pep Sinton, Inc. v. Thomas ---------- 508

Negligence.

1. An "invitee" is defined as a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage. Lindelow v. Peter Kiewit Sons', Inc. ---------- 1
2. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition, but licensees take the premises as they find them, the only duty of the occupier being to give notice of traps or concealed dangers. Lindelow v. Peter Kiewit Sons', Inc. ---------- 1
3. In a case where contributory negligence is asserted as a defense the evidence may not properly be held to be sufficient to sustain a judgment as a matter of law and defeat a recovery by the plaintiff unless it shows beyond reasonable dispute that plaintiff's negligence is more than slight as compared with the negligence of the defendant. Zager v. Johnson ---- 106
4. Generally it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Schwartz v. Hibdon ---------- 129
5. Reasonable control by the operator of a motor vehicle is such as will enable him to avoid an accident involving another motor vehicle operated without negligence. Schwartz v. Hibdon ---------- 129
6. Duty of driver of motor vehicle being overtaken from the rear by another motor vehicle on the highway stated. Schwartz v. Hibdon ---------- 129
7. Where one driving a motor vehicle is suddenly

confronted by an emergency, requiring instant decision, he is only required to demean himself as an ordinary, careful, and prudent person would have done under like circumstances, and if he does that he is not held to be negligent. Schwartz v. Hibdon 129

8. The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it. Schwartz v. Hibdon ---------- 129

9. Where the driver of a motor vehicle upon a public highway, in attempting to pass another vehicle from the rear, operates his vehicle in such a manner as to strike the other vehicle in passing, he is ordinarily guilty of negligence when the driver of the vehicle being passed is without fault. Schwartz v. Hibdon ---------- 129

10. Conditions affecting the visibilty of a motorist impose upon the driver the duty to exercise a degree of care commensurate with existing circumstances. Schwartz v. Hibdon ---------- 129

11. A motorist overtaking and passing another motor vehicle must exercise vigilance commensurate with the surrounding circumstances. Schwartz v. Hibdon 129

12. In a case where the comparative negligence statute is applicable, the determination of the amount of damages is for the jury. Cullinane v. Milder Oil Co. 162

13. Negligence is not actionable unless it is the proximate cause of injury. Knuth v. Singer ---------- 182

14. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the injury would not have occurred. Knuth v. Singer -- 182

15. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. Knuth v. Singer ---------- 182

16. If the negligence charged does nothing more than furnish a condition by which an injury is made possible, it is not the proximate cause of the injury. Knuth v. Singer ---------- 182

17. Proper application of comparative negligence statute stated. Gross v. Johnson ---------- 273

18. Where it is pleaded and proved that two or more parties, even though recovery is sought against

only one, were guilty of combined negligence which taken together proximately caused injuries to the plaintiff, the entire damage may be assessed by a jury against the one made a party. Hopwood v. Voss ---------- 304

19. The violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law but is evidence of negligence to be considered by the jury in connection with other circumstances in evidence. Hermansen v. Anderson Equipment Co. ---------- 325

20. It is a question for the jury as to whether a motorist failed to observe a motor vehicle approaching on the highway except where the evidence is conclusive that the approaching motor vehicle was within the limit of danger. Hermansen v. Anderson Equipment Co. ---------- 325

21. The driver of a motor vehicle is not required to notice every car that happens actually to be within his range of vision, but only those within that radius which denotes the limit of danger. Hermansen v. Anderson Equipment Co. ---------- 325

22. In an action for damages based upon negligence, the negligent act charged must be a proximate cause of the accident and ensuing injury. Hermansen v. Anderson Equipment Co. ---------- 325

23. A proximate cause is the cause without which the injury would not have occurred. Hermansen v. Anderson Equipment Co. ---------- 325

24. Doctrine of comparative negligence stated. Main v. Sorgenfrei ---------- 523

25. The trial court may, in a negligence case, grant a motion for an instructed verdict or for a judgment notwithstanding the verdict if the evidence, considered most favorably to the party against whom the motion is directed, is insufficient to sustain a verdict for him. Everett v. Hening ---------- 573

26. In an action for damages by reason of alleged negligence of another, evidence as to the financial standing of the parties is inadmissible. Singles v. Union P. R.R. Co. ---------- 816

27. Where the defendant in a personal injury case makes no attempt to show the plaintiff is receiving a pension, it is not proper for the plaintiff to offer testimony showing he received a small and inadequate one. Singles v. Union P. R.R. Co. ---------- 816

New Trial.

1. Where a motion for a new trial presents a question of fact as to the regularity of the proceedings, the trial court becomes the trier of the facts, and its decision thereon will not be disturbed on appeal unless clearly wrong. Haarberg v. Schneider ------ 334
2. A motion for new trial which has been duly and timely filed may be heard at a subsequent term. The court may then pass upon the motion and enter its judgment on the motion for new trial. Workman v. Workman ---------- 471
3. Rule stated as to procedure upon appeal from an order granting a new trial. Main v. Sorgenfrei --- 523
4. On appeal from an order granting a new trial, the duty rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. Main v. Sorgenfrei ---------- 523
5. The appellant then in reply has the right, if he desires, of meeting this contention. Main v. Sorgenfrei ---------- 523
6. On review in the Supreme Court of an order granting a new trial, there is no burden in the sense of a burden of proof upon either party. Main v. Sorgenfrei ---------- 523
7. The burden is upon all parties to assist the court to a correct determination of the question or questions presented. Main v. Sorgenfrei ---------- 523

Notice.

Where the Department of Roads sends a timely notice by certified mail to the county board of the county in which a barricade of a county road is contemplated, and such notice is received and receipted for by an employee of the county clerk's office in the regular course of handling, the service of the notice is complete and in compliance with the statute. Fougeron v. County of Seward ---------- 753

Nuisances.

1. Where one's business operation as conducted materially and injuriously affects the comfort and enjoyment and property rights of those in the vicinity it becomes a nuisance and may be enjoined. Karpisek v. Cather & Sons Constr., Inc. ---------- 234
2. If a private person suffers special and peculiar damage to himself and independent of any damage

sustained by the public at large, a court of equity will grant him relief by injunction. Karpisek v. Cather & Sons Constr., Inc. ---------- 234

3. In order for a private individual to maintain an injunction suit to abate a public nuisance, the injuries sustained by the plaintiff must differ not merely in degree but in kind from those suffered by the members of the community. Karpisek v. Cather & Sons Constr., Inc. ---------- 234

4. The number of the persons who are specially injured by a nuisance does not affect the right of action for such injury or make their injury identical with that of the public at large. Any of such persons may maintain an action for the nuisance. The fact that several persons join in a suit to abate a public nuisance does not show that each of them may not have sustained such special injury as entitles him to relief. Karpisek v. Cather & Sons Constr., Inc. ---- 234

5. It is proper to take into consideration all the injuries and losses caused by the nuisance, such as the depreciation in the market or rental value of plaintiffs' property, and the discomfort, annoyance, and inconvenience in the use thereof. Karpisek v. Cather & Sons Constr., Inc. ---------- 234

Officers.

1. The purpose of statute referred to in opinion is to protect the public by making certain that the duties of county attorney are not influenced by private interest. Where a conflict of interest is not shown, the statute has no application. Roach v. Roach ---- 266

2. A violation of the Liquor Control Act by a member of the Liquor Control Commission affords an adequate basis for a charge upon which an order of removal by the Governor can be based. State ex rel. Meyer v. Sorrell ---------- 340

3. The power of the Governor to remove an officer of the executive branch of the government, appointed for a definite term, requires a sufficient specification of charges, notice, hearing, and adequate competent evidence to sustain the order made. State ex rel. Meyer v. Sorrell ---------- 340

4. An officer exercising quasi-judicial functions may act in a proceeding where he is disqualified by interest, relationship, or bias, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would

prevent absolutely a determination of the proceeding. State ex rel. Meyer v. Sorrell ---------- 340
5. Rules respecting court review of decision of Governor in removing an administrative officer where hearing is required stated. State ex rel. Meyer v. Sorrell ---------- 340
6. A person claiming an office that is usurped or invaded by another may maintain an action in quo warranto upon his own relation, if the prosecuting attorney refuses or neglects to file the information after application to him for that purpose. State ex rel. Brogan v. Boehner ---------- 689
7. Where there is no territorial restriction upon the authority of the officer who administered the oath to an absentee voter, the failure of the certificate of the officer to state the place of the execution of the oath and certificate does not invalidate the ballot. State ex rel. Brogan v. Boehner ------ 689
8. Where the certificate of the officer who administered the oath to an absentee voter, together with other information appearing on the identification envelope, fairly indicates that the officer who administered the oath and executed the certificate was authorized to do so, the ballot is valid. State ex rel. Brogan v. Boehner ---------- 689

Parent and Child.

1. Ordinarily the interests and welfare of a child of tender years will be best served by placing the child in the custody of the natural mother if she is a fit and suitable person. Harding v. Harding ---------- 371
2. In an action involving the custody of minor children, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review. Harding v. Harding ---------- 371

Parties.

1. Statute permitting intervention before trial as a matter of right does not prevent a court of equity in the exercise of its discretion and in the furtherance of justice from allowing intervention after judgment to protect inherent rights of the parties seeking intervention. State ex rel. City of Grand Island v. Tillman ---------- 23

2. The interest required as a prerequisite of intervention is a direct and legal interest of such character that the person seeking to intervene will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. State ex rel. City of Grand Island v. Tillman ---------- 23
3. When the determination of a controversy cannot be had without the presence of a new party to the suit, the court may order the new party to be brought into the suit. Midwest Laundry Equipment Corp. v. Berg ---------- 747
4. When a new party is necessary to the determination of a counterclaim, the court may order the new party to be brought into the action or direct that the counterclaim be made the subject of a separate action. Midwest Laundry Equipment Corp. v. Berg 747

Partition.

1. Involuntary partition of an estate devised in equal shares to the testator's children cannot be decreed contrary to a provision in the will which forbids a division for a reasonable time fixed by the testator in definite terms; the condition not being a void restraint on alienation nor a limitation repugnant to the fee. Wenzel v. Wenzel ---------- 61
2. A court acquiring jurisdiction of property for partition acquires complete jurisdiction of the property and affords complete justice to all parties in that action with respect to the subject-matter. Fairley v. Kemper ---------- 565

Physicians and Surgeons.

A cause of action for malpractice based upon the alleged failure of a physician to remove a foreign object left in the body of a patient by mistake does not accrue until the patient discovers, or in the exercise of reasonable diligence should have discovered, the presence of the foreign object. Spath v. Morrow -- 38

Pleading.

1. Res judicata is ordinarily an affirmative defense. It is only when it affirmatively appears to exist from the petition itself that it affords a basis for sustaining a general demurrer. Card v. Card ---- 124
2. A demurrer to a pleading admits only such facts as are well pleaded. A pleading which alleges only

a conclusion of law or fact does not state a cause of action and is subject to demurrer. Card v. Card ---- 124
3. A party may at any and all times invoke the language of his opponent's pleading, on which the case is being tried on a particular issue, as rendering certain facts indisputable. Knuth v. Singer ---- 182
4. The law of amendments should be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule, nor indicated any reason for discontinuing its judicial application. State v. Mahloch ---------- 190
5. Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in the Supreme Court, although the plaintiff filed no reply either before or after judgment. Anson v. Grace ---------- 258
6. Where the record shows that an action was not commenced within the time required by statute, the petition is subject to demurrer. Gorgen v. County of Nemaha ---------- 588
7. A motion to strike a petition from the files because the facts pleaded are insufficient is in effect a general demurrer and admits the truth of facts well pleaded. Lewin v. Lewin ---------- 596
8. A petition may properly be stricken where it appears that its fatal defects extend to the pleading as a whole. A petition that shows on its face that a cause of action cannot be stated by amendment is such a pleading. Lewin v. Lewin ---------- 596
9. Where the allegations of a petition, to which a policy of insurance is attached, show that an advance deposit on an insurance policy was paid by the agent upon the promise of the insured to pay it, and that the amount is due and unpaid, the petition states a cause of action. R. B. Jones & Sons, Inc. v. Nelson 655
10. Where the allegations of a petition are supported by competent evidence sufficient to make a prima facie case, it is error for the trial court to sustain a motion to dismiss. R. B. Jones & Sons, Inc. v. Nelson ---------- 655
11. Where the evidence shows that a person is sued in his personal capacity on an obligation alleged to have been contracted by him, any judgment rendered must run against him personally. R. B. Jones & Sons, Inc. v. Nelson ---------- 655
12. A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are

issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. Jones v. Village of Farnam ---------- 704
13. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof. Jones v. Village of Farnam ------ 704
14. An amended pleading supersedes the original pleading, and thereafter the original pleading ceases to perform any office as a pleading. Midwest Laundry Equipment Corp. v. Berg ---------- 747
15. An answer may include a counterclaim when the counterclaim arises out of the contract or transaction which is the subject of the action or is connected with the subject of the action. Midwest Laundry Equipment Corp. v. Berg ---------- 747
16. The adjustment of defendant's demands by cross-claim in plaintiff's action rather than by independent suit is favored and encouraged by law. Midwest Laundry Equipment Corp. v. Berg ---------- 747

Process.
1. It is not necessary that a summons be served on a cross-petition filed after answer day on defendants who thereafter file answers to the original petition and who are represented by attorneys at the trial of the case. Fairley v. Kemper ---------- 565
2. An action is commenced at the date of the summons served upon the defendant or on the date on which the defendant enters a voluntary appearance. Gorgen v. County of Nemaha ---------- 588
3. The plaintiff is required to file a praecipe stating the names of the parties to the action with demand that summons issue therefor. Gorgen v. County of Nemaha ---------- 588

Public Service Commissions.
1. Where there is evidence to sustain the factors advanced by the parties which are required to be considered by the railway commission under the Motor Carrier Act, the determination of the public interest is for the commission and not the courts. Black Hills Stage Lines, Inc. v. Greyhound Corp. ---------- 425
2. Where there is evidence to sustain a finding of the railway commission that the benefit which would be denied the general public outweighs the detriment accruing to existing carriers, it cannot be said that the granting of a new certificate is unreasonable or

arbitrary. Black Hills Stage Lines, Inc. v. Greyhound Corp. ---------- 425
3. Proposed contracting shippers desiring a specialized service are entitled to service in accordance with their needs. Where the evidence is in conflict as between an applicant for a contract-carrier permit and objecting common carriers, it is the province of the railway commission to resolve the issue. Hagen Truck Lines, Inc. v. Ross ---------- 646

Public Utilities.

Where two public service corporations are occupying the same area and rendering service therein, the obligation to serve is upon the one from which service is requested. State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. ---------- 350

Quo Warranto.

1. A person claiming an office that is usurped or invaded by another may maintain an action in quo warranto upon his own relation, if the prosecuting attorney refuses or neglects to file the information after application to him for that purpose. State ex rel. Brogan v. Boehner ---------- 689
2. In an action of quo warranto charging usurpation of office, the relator is not required to file a bond. State ex rel. Brogan v. Boehner ---------- 689

Receiving Stolen Goods.

1. Guilty knowledge, which is an element of the crime of receiving stolen property, may be proved by circumstantial evidence. State v. Henry ---------- 432
2. Where the facts which were known to a defendant were such that a man of the age, intelligence, and experience of the defendant would know that the property was stolen, the jury can find that the defendant had guilty knowledge. State v. Henry ---- 432

Robbery.

The testimony of a single witness which identifies a defendant as a participant in a robbery is sufficient to sustain a finding of guilt if the witness had a reasonable opportunity to observe the defendant. State v. Wilson ---------- 86

Sales.

Under statute on conditional sales, where the vendee

is a nonresident of Nebraska, the filing of a conditional sale contract covering personal property in the office of the county clerk in the county where the property is located gives constructive notice of the conditional sale contract to a purchaser without actual notice. Sheridan v. Dudden Implement, Inc. 578

Searches and Seizures.

1. Under the Fourth and Fourteenth Amendments to the Constitution of the United States, all evidence obtained by unlawful searches and seizures is inadmissible in the courts of this state. Erving v. State 90
2. All evidence obtained by searches and seizures in violation of the federal Constitution is inadmissible in a criminal trial in the courts of this state. State v. Easter ---------- 412
   State v. Goff ---------- 548
3. The issues of unlawful arrest and unconstitutional search and seizure are questions for the trial court and are not subject to review by a jury. State v. Easter ---------- 412
4. Where one availed himself of the privilege of doing business as a corporation, even though its sole shareholder, documents which he could have protected from seizure, if they had been his own, could be used against him, even though they were illegally obtained from the corporation. State v. Easter ---- 412
5. Immunity against the use of illegally obtained evidence cannot be claimed by a defendant if he does not own or have a proprietary interest in the property which has been seized. State v. Easter ------ 412
6. All evidence obtained by searches and seizures in violation of the Fourth Amendment to the federal Constitution is, by virtue of the due process clause of the Fourteenth Amendment, inadmissible in a state court. State v. Goff ---------- 548
7. The Fourth Amendment's right of privacy is enforceable against the states through the due process clause of the Fourteenth Amendment. State v. Goff ---------- 548
8. Prior ruling on effect of unlawful search and seizure modified to extent stated. State v. Goff ---------- 548

States.

1. Statute providing for suits against the state covers all the various claims and demands on which the state may be sued. Gentry v. State ---------- 515

2. The consent of the state to be sued is a limited consent and cannot be broadened by broad equitable principles. Gentry v. State ---------- 515
3. Statutes authorizing suits against the state are to be strictly construed. Gentry v. State -------- 515
4. The state, as trustee of public property and funds, cannot be sued without its consent. Gentry v. State 515

Statutes.
1. The distinction between a remedial and penal statute necessarily lies in the fact that the latter is prosecuted for the sole purpose of punishment, and to deter others from offending in like manner. Shamberg v. City of Lincoln ---------- 146
2. A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions. Shamberg v. City of Lincoln ---------- 146
3. By virtue of the language contained in statute respecting electric transmission lines, and the history of the provision, the right to obtain service from persons, associations, or corporations, operating electric transmission lines outside the limits of incorporated cities or villages, extends to all persons, associations, and corporations residing within the statutorily described territory. State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. ---- 350
4. The origin of the history which makes this so is contained in the declaration of intent contained in the title to the original act, which declaration has not been changed by later legislative action or judicial determination. State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. ---------- 350
5. In the adoption of legislation it must be presumed that the Legislature had in mind all previous legislation on the subject. State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. ---------- 350
6. Resort to the title to a previous act is properly available for the purpose of ascertaining legislative intent. State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. ---------- 350
7. The 1961 legislative act establishing a public power commission did not destroy or impair the obligation imposed and rights declared under prior legislative act. State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. ---------- 350
8. All of the obligations imposed and rights declared

by statute requiring service by electric corporations was preserved in legislation creating public power districts. State ex rel. Dawson County Feed Products v. Omaha P. P. Dist. ---------- 350
9. Statutes authorizing suits against the state are to be strictly construed. Gentry v. State ---------- 515
10. The Legislature may classify the subjects, persons, or objects as to which it legislates if such classification rests upon differences in situations or circumstances between things dealt with in one class and those dealt with in another. Fougeron v. County of Seward ---------- 753
11. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. Fougeron v. County of Seward ---------- 753

Subrogation.
1. Definition of the doctrine of subrogation made and applied. Sheridan v. Dudden Implement, Inc. ---- 578
2. Ordinarily an assignment is not essential to the enforcement of a right of subrogation. Sheridan v. Dudden Implement, Inc. ---------- 578

Taxation.
1. A private tax sale certificate on which action has been properly commenced within 5 years will not become void by reason of the period of time which thereafter transpires during the pendency of the action. Fairley v. Kemper ---------- 565
2. In this jurisdiction an opportunity to be heard with right of review upon the question of assessments for benefits is all that is required to satisfy the due process provisions of the Constitutions of Nebraska and the United States. Jones v. Village of Farnam 704

Tender.
A tender may not be regarded as valid or sufficient, even if it appears that it would have been futile, unless it is made to appear that at the time the tender was made there was a present and immediate ability to make the tender good. Anson v. Grace ---------- 258

Trade Names.
1. Where a party has acquired a trade name in a particular locality, he is entitled to protection against

unfair competition in his particular line of business by the use of a competitor of a name of such similar import as to probably deceive the public. Ransdell v. Sixth Street Food Store ---------- 875

2. Proof of fraud or deliberate deception is not necessary to establish unfair competition. Ransdell v. Sixth Street Food Store ---------- 875

3. A combination of the use of geographical names with generic words relating to the description of a business may be used together in such a manner as to create a deceptive use under particular circumstances, and if they do, then such use may be actionable. Ransdell v. Sixth Street Food Store -------- 875

4. One first adopting a trade name is entitled to relief where the combination of generic words and geographical words or symbols is apt to mislead purchasers. Ransdell v. Sixth Street Food Store ------ 875

Trial.

1. Rule for consideration of motion for directed verdict or for judgment notwithstanding the verdict stated. Lindelow v. Peter Kiewit Sons', Inc. ------ 1

2. In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Lindelow v. Peter Kiewit Sons', Inc. ---------- 1

3. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Lindelow v. Peter Kiewit Sons', Inc. ---------- 1

4. A mere scintilla of evidence is not enough to require the submission of an issue to the jury. Lindelow v. Peter Kiewit Sons', Inc. ---------- 1

5. If, from undisputed evidence, different minds may not reasonably reach different conclusions or draw different inferences, the trial court should render judgment consistent with the facts. Lindelow v. Peter Kiewit Sons', Inc. ---------- 1

6. The testimony of a single witness which identifies a defendant as a participant in a robbery is sufficent to sustain a finding of guilt if the witness

had a reasonable opportunity to observe the defendant. State v. Wilson ---------- 86
7. Where different minds may draw different conclusions from the evidence in regard to negligence, the question is one for submission to a jury. Zager v. Johnson ---------- 106
8. In a case where contributory negligence is asserted as a defense the evidence may not properly be held to be sufficient to sustain a judgment as a matter of law and defeat a recovery by the plaintiff unless it shows beyond reasonable dispute that plaintiff's negligence is more than slight as compared with the negligence of the defendant. Zager v. Johnson ---- 106
9. A jury should be fully and fairly informed as to the various items of damage which it should take into consideration, together with the proper basis upon which each item is to be assessed. Zager v. Johnson 106
10. Where an instruction is so worded as necessarily to leave the jury to uncertain conjecture as to the meaning, and therefore liable to lead the jury astray in its consideration of the case, it is good ground for a new trial. Zager v. Johnson ---------- 106
11. If the court either on request or on its own motion attempts to define a method of arriving at present worth or value of future damages, and the instruction fails to contain a legal or comprehensive definition, it is prejudicially erroneous. Zager v. Johnson ---------- 106
12. The force and effect to be given the fact of possession of stolen property recently after the theft, and the sufficiency or insufficiency of such evidence, are solely for the jury. It is improper for the court to instruct the jury as to the effect to be given, or the sufficiency of, the evidence, in whole or in part. State v. Kent ---------- 115
13. View of the premises by trial court should be given consideration by the Supreme Court on appeal. McCubbin v. Village of Gretna ---------- 139
14. It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses. Cullinane v. Milder Oil Co. ---------- 162
Main v. Sorgenfrei ---------- 523
15. Triers of fact have the right to test the credibility of witnesses and to weigh their undisputed parol testimony against the facts and circumstances in evi-

dence from which a conclusion may properly be drawn that the witness was mistaken. Cullinane v. Milder Oil Co. ---------- 162
16. In a case where the comparative negligence statute is applicable, the determination of the amount of damages is for the jury. Cullinane v. Milder Oil Co. 162
17. Where a party has sustained the burden and expense of a trial, and has succeeded in securing the verdict of a jury on facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Cullinane v. Milder Oil Co. ---------- 162
18. A party may at any and all times invoke the language of his opponent's pleading, on which the case is being tried on a particular issue, as rendering certain facts indisputable. Knuth v. Singer ---------- 182
19. A failure to instruct the jury upon the issues presented by the pleadings and evidence, whether requested to do so or not, is prejudicial error. Omey v. Stauffer ---------- 247
20. Instructions which are inconsistent and tend to mislead and confuse the jury are erroneous and prejudicial. Omey v. Stauffer ---------- 247
21. An instruction on the burden of proof which fails to inform the jury as to what its verdict should be in the event the evidence is equally balanced or preponderates in favor of the defendant is prejudicially erroneous. Omey v. Stauffer ---------- 247
22. An instruction relating to the duty to give an appropriate signal before turning a motor vehicle from a direct course upon a highway is incomplete if it fails to instruct as to the signals which are authorized and required. Omey v. Stauffer ---------- 247
23. The giving of an oral instruction to the jury in regard to the principles of law applicable to the case and to the evidence, without a waiver of the statutory requirement that it be in writing, is reversible error. Omey v. Stauffer ---------- 247
24. Proper application of comparative negligence statute stated. Gross v. Johnson ---------- 273
25. It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses. Gross v. Johnson ---------- 273
26. It is not the prerogative of a trial court to make an independent investigation of the issues between the

parties when there is no provision of law providing for such an investigation. Caldwell v. Wells ------ 288
27. An independent investigation by a trial court is improper procedure and prejudicial when it is not authorized by statute. Caldwell v. Wells -------- 288
28. The findings of the court in an action where a jury is waived have the same weight as a verdict of a jury. State v. Crowley ---------- 291
29. Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence. Snowardt v. City of Kimball ---------- 294
30. Where the court instructs a jury correctly on a subject involved on the trial of a case, and a party desires more explicit instruction with regard thereto, it is his duty to offer a more specific instruction. Hopwood v. Voss ---------- 304
31. The instructions of the trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence. Hopwood v. Voss -- 304
32. The credibility of witnesses and the weight of evidence are, in an action at law, for the jury and its verdict may not be disturbed by the Supreme Court unless it is clearly wrong. Hermansen v. Anderson Equipment Co. ---------- 325
33. Disputed questions of fact in an action at law are by the verdict of the jury resolved in favor of the prevailing party and in deciding an appeal the evidence and reasonable inferences therefrom are required to be considered most favorably to him. Hermansen v. Anderson Equipment Co. ---------- 325
34. Before a verdict can be properly directed, the position of the oncoming motor vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger; otherwise the question becomes one for the jury. Hermansen v. Anderson Equipment Co. ---------- 325
35. Party defendant may move for summary judgment prior to service of responsive pleading. Arla Cattle Co. v. Knight ---------- 360
36. In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law. Arla Cattle Co. v. Knight ---------- 360

37. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. Arla Cattle Co. v. Knight 360
38. The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial. Arla Cattle Co. v. Knight 360
Ransdell v. Sixth Street Food Store 875
39. The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn from a consideration of the actions of the defendant viewed in the light of all surrounding circumstances. State v. Brown 393
40. Intent may be inferred from the nature of the act itself and the circumstances surrounding it. State v. Brown 393
41. Instructions must be considered as a whole in determining whether a particular instruction or a part thereof is prejudicial. State v. Brown 393
42. It is the better practice for a trial court to give a cautionary instruction on the testimony of an accomplice, but a failure to do so is not reversible error unless such an instruction was requested. State v. Brown 393
State v. Henry 432
43. Where there is distinct evidence on each material fact necessary to establish the guilt of the accused, a verdict against him will be upheld, although such testimony may be contradicted by other witnesses. State v. Easter 412
44. A defendant may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made. State v. Easter 412
45. While it would not be improper to admonish the jury in the instructions to disregard any testimony ordered stricken during the course of the trial, it is not a necessary instruction. State v. Easter 412
46. Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism. State v. Burton 457
47. A person who has an interest in the matter in

litigation and in the success of either party to an action has a right to intervene in the litigation either before or after the issue has been joined and before the trial begins. Workman v. Workman ---------- 471

48. Rule as to consideration and effect of physical facts as evidence stated. Main v. Sorgenfrei ---- 523

49. Where there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury. Main v. Sorgenfrei ---- 523

50. In a case where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. Main v. Sorgenfrei ---------- 523

51. It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict, otherwise the jury may be confused and misled. Main v. Sorgenfrei ---------- 523

52. In an action for damages it is the duty of the court to instruct the jury as to the proper measure of recovery. The tendering of a proper instruction is not a condition precedent to the assignment as error of an erroneous instruction on the measure of damages. Main v. Sorgenfrei ---------- 523

53. Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required since a remittitur would amount only to a substitution of the judgment of the court for that of the jury. Main v. Sorgenfrei -- 523

54. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. O'Neill v. State ---------- 540

55. The judge presiding at a trial must conduct it in a fair and impartial manner. A remark or comment which is shown to be prejudicial to the rights of the party complaining, or which is such that it

may be assumed prejudice will result therefrom, is fatal to the validity of the trial. State v. Goff -- 548

56. The practice of causing unexamined witnesses, except those called as experts, to be sequestered, so that they may not hear the testimony of the witness being examined, is a good one, as it tends to elicit the truth and promote the ends of justice. State v. Goff ---------- 548

57. When evidence is conflicting, the verdict of a jury, or the finding of fact by a court in a law action for damages where a jury is waived, will be set aside where manifestly excessive and clearly wrong. State v. Dillon ---------- 560

58. In a case where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed. Everett v. Hening ---------- 573

59. The burden of proving a cause of action or defense is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture. Everett v. Hening ---------- 573

60. The trial court may, in a negligence case, grant a motion for an instructed verdict or for a judgment notwithstanding the verdict if the evidence, considered most favorably to the party against whom the motion is directed, is insufficient to sustain a verdict for him. Everett v. Hening -------- 573

61. The admission of immaterial or irrelevant evidence in a trial to the court is not reversible error. State ex rel. Weiner v. Hans ---------- 612

62. The future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person. Herndon v. Crawford ---------- 618

63. The court is not required to give a proffered instruction upon a subordinate issue, or which unduly emphasizes a part of the evidence in the case. Reller v. City of Lincoln ---------- 638

64. When the court adequately instructs upon an issue presented by the pleadings or evidence, it is not error to refuse to give a tendered instruction covering the same subject matter. Reller v. City of Lincoln ---------- 638

65. Where the allegations of a petition are supported by competent evidence sufficient to make a prima facie case, it is error for the trial court to sustain a

motion to dismiss. R. B. Jones & Sons, Inc. v. Nelson 655
66. Where the evidence and circumstances of a crime are such that different conclusions may properly be drawn therefrom as to the degree of homicide, the question of degree is for the determination of the jury. State v. Marion ---------- 698
67. It is not the province of the Supreme Court to resolve conflicts in the evidence in criminal actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Marion ---- 698
68. It is the duty of the court, upon request of the accused, to instruct the jury upon his theory of the case if there is any evidence to support it. State v. May ---------- 717
69. It is prejudicially erroneous not to give a tendered instruction embodying a correct proposition of law if such proposition is applicable to the facts and material to the defense. State v. May ---------- 717
70. It is prejudicially erroneous to exclude impeaching testimony which would be of importance to the defense of an accused if a sufficient foundation is laid for impeachment. State v. May ---------- 717
71. An instruction in a criminal case, the effect of which is to infringe upon the right of a jury as the judge of the credibility of witnesses and the weight to be given their testimony, is an invasion and an abridgment of a substantial right of the defendant. State v. May ---------- 717
72. The testimony of a witness is not surrounded with such sanctity as to require it to be accepted by triers of fact as true in the absence of controversion by other witnesses or conflict with other testimony. State v. May ---------- 717
73. Instructions to a jury should be considered as a whole and if they fairly submit the case that is all the law requires. Hiner v. Nelson ---------- 725
Singles v. Union P. R.R. Co. ---------- 816
74. The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear. Hiner v. Nelson -- 725
75. Where the meaning of an instruction is clear and a correct statement of the law, error cannot be predicated on the selection of words. Hiner v. Nelson 725
76. Instructions set out in the opinion are held not to be erroneous. Huetter v. Cascio ---------- 771

77. Whether a party may withdraw his rest and introduce further testimony rests within the sound discretion of the trial court. Johnson v. City of Lincoln 837
78. The burden is upon the party moving for a summary judgment to show that no issue of fact exists and unless he can conclusively do so, the motion must be overruled. Ransdell v. Sixth Street Food Store ---- 875
79. In considering a motion for summary judgment, the court should view the evidence in the light most favorable to the party against whom it is directed. Ransdell v. Sixth Street Food Store ---------- 875
80. A genuine issue as to a material fact cannot be tried and determined upon affidavits, and this is especially true where the credibility of witnesses is involved. Ransdell v. Sixth Street Food Store ---- 875
81. An order affecting a substantial right in an action is a final order when it in effect determines the action and prevents a judgment. Dorshorst v. Dorshorst ---------- 886

Trover and Conversion.

In an action for conversion, the identity of the property must be established by a preponderance of the evidence. Elander v. Kellogg Grain Co. ---------- 782

Trusts.

1. When a person obtains the legal title to real estate belonging to another by means of fraud or misrepresentation, actual or constructive, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. A court of equity will enforce such a trust for the benefit of the grantor or those claiming under him. Light v. Ash ---------- 44
2. Trusts arising by implication, or by operation of law, are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception. Light v. Ash -------- 44
3. Circumstances under which a court of equity will raise a constructive trust stated. Light v. Ash ---- 44
4. A constructive trust is defined. Light v. Ash ---- 44
5. A promise need not be express in order to raise a constructive trust, actual cooperation and silent acquiscence on the part of the grantee being sufficient where he has knowledge of the grantor's intention and understanding of the transaction. Light v. Ash ---------- 44

6. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. Light v. Ash ---------- 44
7. A suit for the establishment or enforcement of a constructive trust may be maintained by the person prejudiced or deprived of a benefit by the fraud, actual or constructive, which gives rise to the trust, or by the successors in interest of such person. Workman v. Workman ---------- 471
8. All persons may join in a suit to establish and enforce a trust who have similar interests, arising out of the same trust, and who are seeking the same relief, although their interests are not joint. Workman v. Workman ---------- 471

Usury.

1. The design of the Installment Loan Act is to license and control the business of making installment loans and to restrict the enforcement or collection of illegal loans once they have been made. Hansen v. Commonwealth Co. ---------- 70
2. The burden of proving usury in an action on a promissory note rests upon the party charging it unless usury is apparent on the face of the note. Hansen v. Commonwealth Co. ---------- 70
3. Since usury is generally accompanied by device, subterfuge, scheme, and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form, and the right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument. Hansen v. Commonwealth Co. ---------- 70

Venue.

A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed. State v. Losieau ---------- 320

Waters.

1. The owner of land upon which springs are located and from which waters flow in a well-defined channel in the course of drainage through other

lands does not have an exclusive right to control and use the waters to the injury of lower riparian owners or senior appropriators. Rogers v. Petsch -- 313

2. Waters flowing from springs which do not form a watercourse or lake are surface waters until they empty into and become a part of a natural stream or lake. Rogers v. Petsch ---------- 313

3. The owner of land upon which surface waters arise may retain them for his own use and change their course upon his own land by a ditch or embankment. Rogers v. Petsch ---------- 313

4. Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than 10 years belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong. Krimlofski v. Matters ---------- 774

5. Land uncovered by a gradual subsidence of water is not an accretion but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner. Krimlofski v. Matters ---------- 774

6. Accretion and reliction are defined. Krimlofski v. Matters ---------- 774

7. Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. Krimlofski v. Matters ---------- 774

8. The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto. Krimlofski v. Matters ---------- 774

9. Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact. Krimlofski v. Matters ---------- 774

10. Land, to be riparian, must have the stream flowing over it or along its border. Krimlofski v. Matters -- 774

Wills.

1. Involuntary partition of an estate devised in equal

shares to the testator's children cannot be decreed contrary to a provision in the will which forbids a division for a reasonable time fixed by the testator in definite terms; the condition not being a void restraint on alienation nor a limitation repugnant to the fee. Wenzel v. Wenzel ---------- 61

2. Essental elements of undue influence in a will contest stated. Cook v. Ketchmark ---------- 222

3. In a will contest where undue influence is alleged, that question should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of testator, but the result of undue influence exercised upon him. Cook v. Ketchmark ---------- 222

4. Undue influence is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inferences from the surrounding facts and circumstances. Cook v. Ketchmark ---------- 222

5. In making proof, a contestant is not limited to the bare facts that he may be able to adduce, but he is entitled to the benefit of all inferences which may be legitimately derived from established facts. Cook v. Ketchmark ---------- 222

6 The declarations of a testator are admissible to show his state of mind and consequent susceptibility to undue influence. Cook v. Ketchmark ---------- 222

7. While the mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary has exercised undue influence over the testator, the relationship may be considered with all of the other facts and circumstances in the case in determining undue influence. Cook v. Ketchmark ---------- 222

8. The fact that a will is unnatural or unreasonable in the distribution of property is a circumstance to be considered by the jury in connection with other evidence bearing on the question of whether the will is the result of undue influence. Cook v. Ketchmark ---------- 222

9. A gift of property by will to an existing cemetery association is a gift to a charitable trust to be used for the purpose indicated in the will, and if no specific purpose is specified, then in the performance of the lawful objects and purposes of the

cemetery association. Root v. Morning View Cemetery Assn. ---------- 438
10. In case of the failure of the charitable purpose of a gift by will to a cemetery association, the gift would pass to the heirs of the testator, and they would be proper parties to maintain action for recovery thereof. Root v. Morning View Cemetery Assn. ---------- 438
11. No right of a citizen is more valued than the power to dispose of his property by will, and this right is in no manner based upon its judicious exercise. Root v. Morning View Cemetery Assn. ---------- 438
12. The provisions of a will must be construed with a view to carrying out the intention of the testator, and unless there is something in it contrary to the law of the state, or in contravention of public policy, it will not be declared invalid. Root v. Morning View Cemetery Assn. ---------- 438
13. When an appeal is taken from a judgment of the county court denying the admission of a will to probate, the party appealing is required to file a petition on appeal within 50 days from the date of the rendition of such judgment unless the court, on good cause shown, shall otherwise order. Leu v. Swenson ---------- 591
14. The county courts of this state have exclusive original jurisdiction in all matters of probate and the settlement of estates of deceased persons by virtue of Article V, section 16, Constitution of Nebraska. Lewin v. Lewin ---------- 596
15. The fact that a will expresses the intention of the testator to disinherit certain persons does not prevent such persons from sharing as heirs-at-law or next of kin in property as to which the testator died intestate. Katt v. Claussen ---------- 603
16. Ordinarily a class gift is a gift to two or more persons who are not named and who have one or more characteristics in common by which they are indicated or who answer to a general description. Katt v. Claussen ---------- 603
17. If the gift is made to beneficiaries by name, the gift is, prima facie, not one to a class, even if the individuals who are named possess some quality or characteristic in common. This is particularly true if the beneficiaries are not described as having some quality or attribute in common. Katt v. Claussen ---------- 603

18. The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself in the light of attendant circumstances under which it was made. Katt v. Claussen ---------- 603
19. It is a natural presumption that a testator making his will intended to dispose of his whole estate and not to die intestate as to any part of it. In construing doubtful expressions this presumption has weight, but it cannot supply the actual intent of the testator to be derived from the language of the will. Katt v. Claussen ---------- 603
20. In construing a will a court is required to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law. Katt v. Claussen ---------- 603

Witnesses.
1. A party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable. Lindelow v. Peter Kiewit Sons', Inc. ---------- 1
2. A defendant in a criminal case who testifies in his own behalf is subject to the same rules of cross-examination as any other witness. Erving v. State -- 90
3. Cross-examination of a witness upon a collateral matter to ascertain the credibility of a witness is subject to the discretion of the trial court. Erving v. State ---------- 90
4. The credibility of witnesses and the weight of evidence are, in an action at law, for the jury and its verdict may not be disturbed by the Supreme Court unless it is clearly wrong. Hermansen v. Anderson Equipment Co. ---------- 325
5. The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be put in evidence. State ex rel. Meyer v. Sorrell ---------- 340
6. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown. State v. Brown ---------- 387
7. Requirements for laying foundation for impeachment of witness stated. State v. Witmer ---------- 449
8. The impeachment of a witness by showing contradictory statements made by him is admitted solely

for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated. State v. Witmer ---------- 449

9. A trial court in a criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness leading questions. The discretion is a legal one and subject to proper limitations. State v. Burton ---------- 457

10. Error was not committed by trial court in permitting leading questions to be asked. State v. Burton ---- 457

11. The practice of causing unexamined witnesses, except those called as experts, to be sequestered, so that they may not hear the testimony of the witness being examined, is a good one, as it tends to elicit the truth and promote the ends of justice. State v. Goff ---------- 548

12. Prior opinion, that in an action by a nonresident married women against a representative of a deceased person to recover title to lands in this state, her husband is a competent witness to testify to conversations with such deceased person, is overruled. Light v. Ash ---------- 627

13. In jury cases, jurors are the judges of credibility of witnesses and the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. State v. May ---------- 717

14. The testimony of a witness is not surrounded with such sanctity as to require it to be accepted by triers of fact as true in the absence of controversion by other witnesses or conflict with other testimony. State v. May ---------- 717

15. Where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. Johnson v. City of Lincoln ---------- 837

16. The owner of personal property is qualified by reason of the ownership relation to give his estimate of the value of such property. Johnson v. City of Lincoln ---------- 837

Workmen's Compensation.

1. An appeal in a workmen's compensation case is considered and determined de novo on the record in the

Supreme Court. Seymour v. Journal-Star Printing Co. ---------- 150
2. A compensable injury within the meaning of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. Seymour v. Journal-Star Printing Co. 150
3. An accident within the meaning of the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury. Seymour v. Journal-Star Printing Co. ---------- 150
Cochran v. Bellevue Bridge Commission ---------- 761
4. The burden of proof is on the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. Seymour v. Journal-Star Printing Co. ---------- 150
Snowardt v. City of Kimball ---------- 294
5. Exertion which is no greater than that ordinarily incident to the employment cannot of itself constitute an accident and, if combined with preexisting disease such exertion produces disability, it does not constitute a compensable accidental injury. Seymour v. Journal-Star Printing Co. ---------- 150
6. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. Seymour v. Journal-Star Printing Co. ---------- 150
7. Orchard & Wilhelm Co. v. Petersen, 127 Neb. 476, 256 N. W. 37, is overruled on effect of admission in evidence of accident report. Seymour v. Journal-Star Printing Co. ---------- 150
8. By statute, the plaintiff is required to give notice in writing as soon as practical after the accident, make a claim for compensation within 6 months, and commence action within 1 year. Seymour v. Journal-Star Printing Co. ---------- 150
9. In case of latent injury, the time for commencement of action is extended to 1 year after the employee obtained knowledge that the accident caused compensable disability. Seymour v. Journal-Star Printing Co. ---------- 150
10. The limitation of the statute relates to the time when compensable disability became known, and not when the full extent of the disability was ascertained. Seymour v. Journal-Star Printing Co. ---- 150

11. Total permanent and partial permanent disability are defined by the Workmen's Compensation Act in terms of employability and earning capacity rather than in terms of loss of bodily function. Nordahl v. Erickson ---------- 204
12. In defining total disability in the Workmen's Compensation Act, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof. Nordahl v. Erickson ---------- 204
13. Total disability under the Workmen's Compensation Act is defined. Nordahl v. Erickson ---------- 204
14. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law. Nordahl v. Erickson ---------- 204
15. Where there have been two accidents to an employee, the question of whether the disability sustained should be attributable to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. Snowardt v. City of Kimball ---------- 294
16. Where the first accident is not the proximate cause of the second accident, the second accident constitutes an independent intervening cause. Snowardt v. City of Kimball ---------- 294
17. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. Snowardt v. City of Kimball ---------- 294
Cochran v. Bellevue Bridge Commission ---------- 761
18. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. Snowardt v. City of Kimball ---------- 294
19. Right to rehearing in Workmen's Compensation Court is paramount and exclusive of the right to take direct appeal to the district court from the original decision. Skalak v. County of Seward ---- 659
20. In a workmen's compensation proceeding where it is claimed that accidental injury was sustained, the burden is on the plaintiff to establish by a preponderance of the evidence that a personal injury was

sustained by him in an accident which arose out of and in the course of his employment. Skalak v. County of Seward ---------- 659

21. A workmen's compensation case is considered and determined de novo on the record by the Supreme Court and on that basis the determination is made as to whether or not the plaintiff has sustained the burden of proof imposed. Skalak v. County of Seward ---------- 659

22. In order to sustain a right of recovery, a plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that he suffered an unexpected or unforeseen injury which happened suddenly and violently, with or without human fault, which at the time produced objective symptoms of an injury. Skalak v. County of Seward ---------- 659

23. In a workmen's compensation case the burden is on the plaintiff to prove by a preponderance of the evidence that an accident occurred. Cochran v. Bellevue Bridge Commission ---------- 761

24. In order that a recovery may be had in an action under the Workmen's Compensation Act it must be proved that an accident occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death. Cochran v. Bellevue Bridge Commission ---------- 761

25. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. Cochran v. Bellevue Bridge Commission ---------- 761

26. Mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with pre-existing disease such exertion produces disability or results in death, it does not constitute a compensable accidental injury. Cochran v. Bellevue Bridge Commission ---------- 761

27. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the injured person incurred disability or death as the result of an accident arising out of and in the course of his employment. Cochran v. Bellevue Bridge Commission ---------- 761

Zoning.

1. While a city of the metropolican class has the power

to zone, such zoning must, however, not be unreasonable, discriminatory, or arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance. Bucholz v. City of Omaha ---------- 862

2. The validity of a zoning ordinance must be determined by an examination of the facts presented in the particular case. Whether a zoning ordinance is arbitrary and unreasonable, or illegal, must be determined by the evidence of the special surrounding conditions and circumstances. Bucholz v. City of Omaha ---------- 862

3. The burden is on one who attacks the validity of a zoning ordinance, valid on its face and enacted under lawful authority, to prove facts which establish its invalidity. Bucholz v. City of Omaha ---- 862

4. The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary. Bucholz v. City of Omaha -------- 862

5. Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. Bucholz v. City of Omaha ---------- 862

6. The exercise of the power to zone may not be denied on the ground that individual property rights may be adversely affected thereby. Bucholz v. City of Omaha ---------- 862

7. What is the public good is primarily a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed; and unless an abuse of discretion has been clearly shown, it is not the province of the court to interfere. Bucholz v. City of Omaha 862

8. Spot zoning is a descriptive term rather than a legal term. Spot zoning as such is not necessarily invalid, and its validity depends upon the facts and circumstances appearing in the case. Bucholz v. City of Omaha ---------- 862

9. Spot zoning generally refers to the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned and to the detriment of the area and other owners therein. Bucholz v. City of Omaha ------ 862

10. The fact that only one tract of land or one owner is involved in a zoning change does not make the rezoning invalid spot zoning. Bucholz v. City of Omaha 862

11. Ordinances rezoning certain property to permit the construction of a regional shopping center are not invalid because of the exaction of a protective covenant required by the city. Bucholz v. City of Omaha ---------- 862